SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

vs.

DEPARTMENT OF REVENUE OF THE
STATE OF ILLINOIS, ETC.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

INDEX

	Original	Print
Record from the Circuit Court of Cook County, State of Illinois		
Complaint	2	1
Verification	5	3
Exhibit—Final assessment of Use Tax	6	5
Exhibit—Certificate to foregoing final assessment	7	7
Exhibit—Certificate to foregoing final assessment	8	8
Exhibit—Letter dated June 26, 1963 from Department of Revenue to Secretary of State	9	9
Exhibit—Affidavit of Frances Seipel	10	10
Affidavit of service and alias summons and returns	33	11
Special Appearance and motion to set aside and quash service of alias summons, etc.	42	18
Affidavit of Aaron Maer	59	31
Affidavit of Herman A. Benjamin	63	35

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 28, 1966

	Original	Print
Record from the Circuit Court of Cook County, State of Illinois—Continued		
Order denying motion to quash service	65	37
Motion to strike or dismiss complaint	69	38
Order denying motion to strike or dismiss	89	53
Answer to complaint	90	54
Motion of plaintiff for summary judgment, etc.	111	64
Affidavit of Harry L. Hulman	112	65
Affidavit of William G. Clark	115	66
Affidavit of George Marks of merits in opposition to motion for summary judgment	186	68
Affidavit of William O. Campbell of merits in opposition to motion for summary judgment	192	73
Order and judgment	196	75
Notice of appeal to Supreme Court of Illinois	199	77
Proceedings in the Supreme Court of Illinois	428	86
Opinion, House, J.	428	86
Order of affirmance	439	100
Notice of appeal to Supreme Court of the United States	456	101
Clerk's certificate (omitted in printing)	467	106
Order noting probable jurisdiction	468	106

[fol. 2]

IN THE CIRCUIT COURT OF COOK COUNTY

At Law

No. 63021015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

—vs.—

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

COMPLAINT—Filed October 15, 1963

Department of Revenue of the State of Illinois, for the use of the People of the State of Illinois, as the plaintiff herein, by Harry L. Hulman, its acting Director, by William G. Clark, Attorney General of Illinois, its attorney, Says That

(1) on or after August 1, A.D., 1955, and before the filing of this Complaint, the defendant National Bellas Hess, Incorporated, was engaged in soliciting orders within the State of Illinois from users by means of catalogues or other advertising, as a retailer of tangible personal property;

(2) in accordance with Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes—in relation to a tax upon the privilege of using tangible personal property in the State of Illinois, it was the duty of the said defendant to pay the tax to the plaintiff, at the rate and in the amount provided by statute.

(3) that although the defendant corporation is incorporated in another state and has its principal place of business outside the State of Illinois, the defendant was issued a certificate of Registration, number 953 777 by the Department of Revenue of the State of Illinois as provided by law.

[fol. 3] (4) in accordance with the provisions of Section 3 of the said Use Tax Act, it was the duty of the defendant to file a return with the plaintiff for each month the defendant was engaged in the said business, showing among other things the total amount of gross sales of all tangible personal property made at retail by the defendant within the State of Illinois during each preceding calendar month and the amount of tax due thereon to the plaintiff, and to pay said tax to the plaintiff.

(5) in accordance with the Use Tax Act plaintiff did determine the amount of tax due from the defendant to the plaintiff for certain months according to its best judgment and information for which months no returns were filed by the defendant with the plaintiff and the latter did thereupon notify the defendant on the 21st day of January, A.D., 1963, by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, and a copy to the Secretary of State of the State of Illinois, of the amount due upon the returns as corrected and of the amount of the delinquency computed for months wherein no returns were made, stating that it proposed to assess such amount, with penalties, in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18), photostatic copies of which proposed assessment and the certificate of mailing are attached hereto and marked plaintiff's Exhibits and made a part hereof;

(6) the defendant did not file a protest to said proposed assessment and did not request a hearing thereon within twenty (20) days after said notice of proposed assessment and thereupon the plaintiff made a final assessment of the amount of tax and penalties proposed against the defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18);

(7) on the 26th day of June, A.D., 1963, plaintiff mailed to the defendant by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City,

Missouri, last known address, notice of said final assessment, photostatic copies of said notice of final assessment [fol. 4] and the certificate of mailing being attached hereto, and a copy to the Secretary of State of the State of Illinois, and made a part hereof, marked plaintiff's Exhibits.

(8) the said defendant has not paid any sum on account.

Wherefore, the plaintiff asks for judgment against the said defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18).

William G. Clark, Attorney General of the State of Illinois.

[fol. 5]

VERIFICATION

State of Illinois,
County of Cook, ss

Harry L. Hulman, being first duly sworn, upon his oath deposes and says that

(1) he is of lawful age, and resides in Springfield, in the County of Sangamon, State of Illinois, and is the Director of the Department of Revenue of the State of Illinois;

(2) as such Director of the Department of Revenue of the State of Illinois, he is authorized to, and now does, make this affidavit for and in behalf of the said Department of Revenue, the plaintiff in the above and foregoing complaint; and that he has full knowledge of the facts relating to the claim of the said plaintiff, as set forth in the foregoing complaint;

(3) the matters and things in the said complaint set forth are true, in substance and in fact; and that there is due and owing to said plaintiff from the defendant, after allowing all just deductions and set-offs, the total sum of

Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18); and that

(4) he hereby certifies that the photostatic copies attached hereto and described in said complaint as exhibits thereto and a part of said complaint, are true and correct photostatic copies of records of the Department of Revenue in his custody as such official head of said last-mentioned Department by virtue of the provisions of the Civil Administrative Code of Illinois.

Harry L. Hulman, Deponent.

Subscribed and sworn to before me this 11th day of October A.D. 1963.

Mildred Harris, Notary Public, my commission expires: 8-21-65.

[fol. 6]

EXHIBIT TO COMPLAINT

Series E—ROT No. 1736

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
RETAILERS' OCCUPATION TAX DIVISION

160 No. LaSalle Street
Chicago 1, Ill.

State Office Building
Springfield, Ill.

FINAL ASSESSMENT

Registration Number 953-777
Date of Issue 6-26-63
P. A. Code 222-99-5321 P-14258

National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

Copy to Atty: Benjamin Galton
Robbins & Flato, 21 East
40th Street, New York 16,
New York

A hearing has been held in accordance with the provisions of the Retailers' Occupation Tax Act ☐ and the Municipal Retailers' Occupation Tax Act ☐ and the County Retailers' Occupation Tax Act ☐ and the Use Tax Act ☐ pursuant to protest to the Department's Notice of Proposed Assessment(s) to or against the above taxpayers and request for such hearing thereon. In accordance with the provisions of the aforesaid Act(s), the Department of Revenue hereby issues its FINAL ASSESSMENT(S) to or against the above taxpayers for the amounts of the tax and penalty as shown below:

RETAILERS' OCCUPATION TAX
(Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of:

Tax Delinquencies .....$_____
....% Penalty .....$_____

Total Tax Delinquency and Penalty .....$_____

USE TAX (Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of: July 17, 1961 thru October 31, 1962

Tax Delinquencies $74,593.75
25% Penalty $18,648.43

Total Tax Delinquency and Penalty $93,242.18

RETAILERS' OCCUPATION TAX
(Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of:

Tax Delinquencies .....$_____
....% Penalty .....$_____

Total Tax Delinquency and Penalty .....$_____

	Total Tax	Total Penalties	Total Assessment
Use Tax 100%	$74,592.75	$18,648.43	$93,242.18

Dated this 26th. day of June, 1963

DEPARTMENT OF REVENUE

/s/ THEODORE J. ISAACS
As Director of Revenue

THE ABOVE TOTAL AMOUNT IS PAYABLE IMMEDIATELY

ROT-121 E—Revised Sextuplicate

[fol. 7]

EXHIBIT TO COMPLAINT

CERTIFICATE

STATE OF ILLINOIS,
COUNTY OF SANGAMON, ss.

I, Theodore J. Isaacs, Director of Revenue of the Department of Revenue of the State of Illinois, certify that the attached is a true and complete copy of the Final Assessment issued by the Department of Revenue of Illinois, on June 26, 1963, to National Bellas Hess, Inc., 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18. I further certify that a certified copy of said Final Assessment has been served by this Department on the Secretary of State of Illinois as agent for the said National Bellas Hess, Inc., in accordance with Section 12a of the Use Tax Act.

Dated this 26th. day of June, A.D. 1963

/s/ THEODORE J. ISAACS
Theodore J. Isaacs
Director of Revenue

TJI:CB:bm

[fol. 8]

Exhibit to Complaint

Certificate

State of Illinois,
County of Sangamon, ss.

I, Theodore J. Isaacs, Director of Revenue of the Department of Revenue of the State of Illinois, certify that the attached is a true and complete copy of the Final Assessment issued by the Department of Revenue of Illinois, on June 26, 1963, to National Bellas Hess, Inc., 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18.

Dated this 26th. day of June, A.D. 1963

/s/ Theodore J. Isaacs
Theodore J. Isaacs
Director of Revenue

TJI:CB:bm

[fol. 9]

EXHIBIT TO COMPLAINT

June 26, 1963

Honorable Charles F. Carpentier
Secretary of State
Springfield, Illinois

RE: Registration #953-777
National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

ATTN: Miss Kathryn Hogan

Dear Miss Hogan:

In accordance with Section 12a of the Use Tax Act, I hereby serve you, as agent for the above named taxpayer, with a certified copy of the Final Assessment issued by this Department under the Use Tax Act to the above named taxpayer in the total amount of $93,242.18.

I request that, as agent for said taxpayer for the service of notices and legal process, you notify said taxpayer of this service upon you.

Kindly acknowledge receipt of above on copy of letter attached.

Very truly yours,

DEPARTMENT OF REVENUE

/s/ THEODORE J. ISAACS
Director

TJI:CB:bm

[fol. 10]

EXHIBIT TO COMPLAINT

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS,
COUNTY OF SANGAMON, ss.

Frances Seipel, being first duly sworn on oath deposes and says:

1. That she is an officer or employee of the Department of Revenue of Illinois who has been authorized by the Director of Revenue of Illinois to serve certified copies of notices and legal processes on the Secretary of State of Illinois as agent for taxpayers who are outside Illinois;

2. That in said capacity, she did, on June 26, 1963, serve a certified copy of a Final Assessment issued on June 26, 1963, by the Department of Revenue of Illinois to National Bellas Hess, Inc., whose address is 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18, on the Secretary of State of Illinois as agent for said National Bellas Hess, Inc., who is outside Illinois, by leaving a certified copy of said Final Assessment at the office of the Secretary of State of Illinois at Springfield, Illinois;

3. That in the capacity aforesaid, she then did, on June 26, 1963, send a certified copy of the same Final Assessment, by United States registered mail, postage prepaid, to National Bellas Hess, Inc., at his last known address 715 Armour Road, North Kansas City, Missouri;

4. That a copy of said Final Assessment is hereto attached.

/s/ FRANCES SEIPEL
Affiant

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 26th day of June, A. D. 1963.

/s/ Virginia M. Overkir
Notary Public

My Commission Expires: August 15, 1965

S-54

[fol. 33]

In the Circuit Court of Cook County

[Title omitted]

Affidavit of Service and Alias Summons and Returns

Alfred T. Walsh, being duly sworn on oath, deposes and says as follows:

(1) That he is the duly authorized agent and representative of the Director of Revenue of the Department of Revenue of the State of Illinois and authorized to serve a certified copy of the Alias Summons on the Secretary of State of Illinois as agent for National Bellas Hess, Incorporated, a corporation, located outside the State of Illinois;

(2) That in said capacity, he did on January 13, 1964, serve a certified copy of the Alias Summons issued by the Clerk of the Circuit Court of Cook County, Illinois, issued to Charles F. Carpentier, Secretary of State, pursuant to the Use Tax Act, Ill. Rev. Stat. (1963) Chapter 120, Section 439.12(a), as agent for said National Bellas Hess, Incorporated, a corporation, 715 Armour Road, North [fol. 34] Kansas City, Missouri, by leaving a certified copy of said Alias Summons at the office of the Secretary of State of Illinois at Springfield, Illinois, and a copy of the Complaint filed in this cause;

(3) That in the capacity aforesaid he then did on January 23, 1964, send a like and true certified copy of the Alias Summons, along with a copy of the Complaint filed in this cause, by United States Registered Mail, postage prepaid, to National Bellas Hess, Incorporated, a corporation, at its last known address, 715 Armour Road, North Kansas City, Missouri;

(4) That a certified copy of said Alias Summons is hereto attached.

Alfred T. Walsh, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 22nd day of January, A. D. 1964.

Alice M. Korthauer, Notary Public. My Commission Expires: April, 1964.

[fol. 35] STS #23317

[Stamp—Complaint Waived by Order of Court]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ALIAS

No. 63C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS

v.

NATIONAL BELLAS HESS, INCORPORATED a corporation

SUMMONS

To the defendant:

You Are again Summoned and required to file an answer in this case, or otherwise file your appearance, in the Office of the Clerk of this Court (located in the County Building, Room 412, 118 North Clark Street, Chicago, Illinois), within 30 days after service of this summons, not counting the day of service. If You Fail to Do So, a Judgment or Decree by Default May Be Taken Against You for the Relief Asked in the Complaint.

To the officer:

This summons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned

so indorsed. This summons may not be served later than 30 days after its date.

Witness, ...
Joseph J. McDonough, Clerk of Court

January 8, 1964

William G. Clark, Attorney General, State of Illinois, 160 North LaSalle St., Chicago 1.

Date of service: ....., 19.....

(To be inserted by officer on copy left with defendant or other person)

[fol. 36]

CIRCUIT COURT OF COOK COUNTY

SHERIFF'S FEES

Service and return ..... $.....
Miles ....
Total ..... $.....

....., Sheriff of Cook County

I certify that I served this summons on defendants as follows:

(a)—(Individual defendants—personal):

By leaving a copy and a copy of the complaint with each individual defendant, personally, as follows:

Name of defendant	Date of service
.....	.....
.....	.....
.....	.....
.....	.....

(b)—(Individual defendants—abode):

By leaving a copy and a copy of the complaint at the usual place of abode of each individual defendant with a person

of his family, of the age of 10 years or upwards, informing that person of the contents of the summons, and also by sending a copy of the summons and of the complaint in a sealed envelope with postage fully prepaid, addressed to each individual defendant at his usual place of abode, as follows:

Name of defendant	Person with whom left	Date of service	Date of mailing
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

(c)—(Corporation defendants):

By leaving a copy with the registered agent, officer or agent of each defendant corporation, as follows:

Defendant corporation

National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

Registered agent, officer or agent

Serve Secretary of State,
Charles F. Carpentier, pursuant
To The Use Tax Act, Ill. Rev. Stat. (1963)
Chapter 120 section 439.12A

Date of service

.....
.....

(d)—(Other service):

Recd Nicholas Ciaccio

....., Sheriff of Cook County

By ....., Deputy

Joseph P. McMahon
Clerk of the Circuit Court of Cook County

[fol. 37] STS #23317

[Stamp—Complaint Waived by Order of Court]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ALIAS

No. 63C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation

SUMMONS

To the defendant:

You Are again Summoned and required to file an answer in this case, or otherwise file your appearance, in the Office of the Clerk of this Court (located in the County Building, Room 412, 118 North Clark Street, Chicago, Illinois), within 30 days after service of this summons, not counting the day of service. If You Fail to Do So, a Judgment or Decree by Default May Be Taken Against You for the Relief Asked in the Complaint.

To the officer:

This summons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned so

indorsed. This summons may not be served later than 30 days after its date.

Witness, ...
Joseph J. McDonough, Clerk of Court

(Seal) Jan. 8, 1964

Wiliam G. Clark, Attorney General, State of Illinois, 160 North LaSalle St., Chicago 1.

Date of service: ....., 19....
(To be inserted by officer on copy left with defendant or other person)

[fol. 38] National Bellas Hess, Inc.

715 Armour Road
North Kansas City, Missouri
Serve Secretary of State, Charles F. Carpentier, pursuant To The Use Tax Act, Ill. Rev. Stat. (1963), Chapter 120 section 439.12A

Recd: Nicholas R. Ciaccio

[fol. 39]
State of Illinois,
County of Cook, ss.

I, Joseph J. McDonough, Clerk of the Circuit Court of Cook County, and the keeper of records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain Alias Summons, issued out of this office on the 8th day of January, 1964 A.D. in a certain cause lately pending in said Court, on the law side thereof, between Department of Revenue of the State of Illinois for the Use of the People of the State of Illinois, Plaintiff, and National Bellas Hess, Inc., etc., Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 8th day of January, 1964.

(Seal)

Joseph J. McDonough, Clerk.

[fol. 42]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

SPECIAL APPEARANCE AND MOTION TO SET ASIDE AND QUASH SERVICE OF ALIAS SUMMONS, OR, ALTERNATIVELY, TO SET ASIDE AND QUASH ALIAS SUMMONS, AND DISMISS COMPLAINT—Filed March 24, 1964

Now comes National Bellas Hess, Incorporated (hereinafter called "National Bellas"), by its attorneys, Leibman, Williams, Bennett and Baird, and enters its special and limited appearance for the sole purpose of objecting to the jurisdiction of this Court over its person and moves the Court to set aside and quash the service of the alias summons herein, which plaintiff attempted to make upon it on or about January 23, 1964, or, alternatively, to set aside and quash the alias summons herein, which plaintiff attempted to serve upon it on or about January 23, 1964, and dismiss the complaint.

[fol. 43] As its grounds in support of this motion, National Bellas states that the purported service of alias summons and the purported alias summons, jointly and severally, are void and should be quashed by the Court, because the purported service was not made in accordance with applicable Illinois statutes and its process cannot and does not extend, pursuant to pertinent Illinois statutes, to National Bellas in the premises. Alternatively, as its grounds in support of this motion, National Bellas states that the purported service of alias summons and the purported alias summons, jointly and severally, are void and should be quashed by the Court, because, if such pertinent Illinois statutes are construed to apply to National Bellas in the premises, they, jointly and severally, are unconstitutional, pursuant to applicable provisions of the Illinois

Constitution and the Constitution of the United States, and of no force and effect whatsoever, insofar as National Bellas is concerned.

In its complaint herein, plaintiff admits that National Bellas "is incorporated in another state and has its principal place of business outside the State of Illinois" (Compl., par. (3)). Nowhere does plaintiff allege, or even infer, that National Bellas ever has had or now has a place of business in Illinois. The fact is that National Bellas has not, at any time material herein, had and now does not have any place of business in Illinois.

[fol. 44] It also is clear that plaintiff does not allege, or even infer, in its complaint that National Bellas, admittedly a foreign corporation, ever has qualified or now is qualified to do business in Illinois. See, Illinois Business Corporation Act, as amended, Sections 102 *et seq.* (32 S.H.A., §§157.102 *et seq.*). The fact is that National Bellas has not, at any time material herein, qualified and now is not qualified to do business in Illinois.

The complaint was filed by plaintiff with the Court on October 15, 1963. Summons was issued by the Court on the same date. Purported service thereof was made on November 1, 1963. On or about November 27, 1963, National Bellas appeared specially herein and moved the Court to set aside and quash the service of summons, or, alternatively, to set aside and quash the summons, and dismiss the complaint. By its Order of December 13, 1963, the Court granted National Bellas' motion to set aside and quash service of summons and also set aside and quashed such service and granted to plaintiff leave to obtain and serve an alias summons herein.

Plaintiff obtained an alias summons from the Court on January 8, 1964, with the following endorsement regarding service thereon:

(1) "National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri"

[fol. 45]

(2) "Serve Secretary of State,
Charles F. Carpentier, pursuant
To The Use Tax Act, Ill. Rev. Stat. (1963)
Chapter 120 section 439.12A"

On January 13, 1964, plaintiff made purported service of the alias summons and complaint herein on the Illinois Secretary of State pursuant to the pertinent provisions of Section 12a, Illinois Use Tax Act (120 S.H.A., §439.12a). Subsequently, and via United States registered mail under date of January 23, 1964, purported service of such alias summons and complaint was made, pursuant to such provisions of Section 12a, Illinois Use Tax Act, by plaintiff on National Bellas at its principal office and place of business in North Kansas City, Missouri.

Plaintiff's complaint herein seeks to recover the sum of $93,242.18 from National Bellas. Such sum is alleged to be comprised of the principal amount of $75,593.75, representing a purported delinquent use tax required to be collected and collected, pursuant to the pertinent provisions of the Illinois Use Tax Act, by National Bellas for the "period of July 17, 1961 thru October 31, 1962", and the additional amount of $18,648.43, representing a purported 25% statutory penalty on such alleged delinquency (Compl., pars. 5 and 6 and Exhs. referred to therein). Section 8, Illinois Use Tax Act, provides that (120 S.H.A., §439.8):

> "The tax herein *required to be collected* by any retailer pursuant to this Act, and any such tax *collected* by any retailer shall constitute a *debt* owed by the [fol. 46] retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Italics supplied)

It is obvious that the complaint herein attempts to bottom a debt action against National Bellas on Section 8, Illinois Use Tax Act. In short, plaintiff is proceeding against National Bellas *in personam* in a purported action based on jurisdiction of National Bellas' person. *McCormick* v. *Blaine et al.* (Sup. Ct., Ill., 1931), 345 Ill. 461, 178 N.E. 195, 197. Manifestly, for plaintiff to maintain such action, this Court must, by due process, acquire jurisdiction over the person of National Bellas in the premises.

Insofar as service of process is concerned, Section 12a, Illinois Use Tax Act, which was added to the statute by the Act of July 25, 1961, provides that (120 S.H.A., §439.12a):

> "Any *non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act,* and any *resident* of this State who incurs tax liability under this Act as a *seller* and who subsequently removes from this State or conceals his whereabouts, and any person *(resident or non-resident)* who incurs tax liability under this Act as a *user* in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial [fol. 47] or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the *taxpayer* by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Sec-

retary of State, addressed to such *taxpayer* at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the *taxpayer* personally within this State. Proof of such service upon the *taxpayer* in this State through the Secretary of State as his agent and by mailing to the last known address of the *taxpayer* may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit." (Italics supplied)

It is manifest that, as it is shown *supra,* National Bellas has not, at any time material herein, been and now is not a "resident" "seller" within the meaning of Section 12a, Illinois Use Tax Act. Patently, it has not, at any time material herein, been and now is not a "resident or non-resident" "user" in Illinois within the meaning of that Section of the Act.

Obviously, plaintiff is attempting to maintain service of process herein, pursuant to Section 12a, Illinois Use Tax Act, on the purported ground that National Bellas is a "non-resident of this State who accepts the privilege ex- [fol. 48] tended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act." It is clear that National Bellas has not, at any time material herein, been and now is not a "Retailer maintaining a business in this State" within the meaning of that term set forth in Section 2, paragraph 1, Illinois Use Tax Act.

Assuming, *arguendo,* that Section 2, paragraph 2, of such Act, which further defines such term as "any retailer * * * Engaging in soliciting orders within this State from users by means of catalogues or other advertising,

whether such orders are received or accepted within or without this State", is valid and constitutional, insofar as National Bellas is concerned, it is evident that National Bellas has not, at any time material herein, been and now is not a retailer within such definition, since it has not, at any time material herein, been engaging and now is not engaging "in soliciting orders within this State". Moreover, it has not, at any time material herein, accepted, sought, or received and now is not accepting, seeking, or receiving any "privilege" whatsoever from Illinois regarding its business and its conduct thereof, such as Section 12a, Illinois Use Tax Act, purports to set forth.

Since National Bellas has not, at any time material herein, engaged and now is not engaging in any business [fol. 49] other than interstate commerce, as a non-resident, with Illinois, its "privilege" to engage in such interstate commerce is not extended by the laws of Illinois, but is provided by the United States pursuant to the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3). Furthermore, National Bellas has not, at any time material herein, distributed and now does not distribute its catalogues to Illinois addressees except by United States mail from without the State. The use of the mails is not a "privilege" granted by Illinois; it is a property right of National Bellas and within the exclusive jurisdiction of the United States (U.S. Const., Art. I, §8, cl. 7; *Hoover* v. *McChesney* (Cir. Ct., D. Ky., 1897), 81 Fed. 472, 477-478, 480-481; *Maxwell* v. *United States* (C.A. 8, 1956), 235 F.(2d) 930).

Clearly, National Bellas has not, at any time material herein, been and now is not a "taxpayer" within the meaning of Section 12a, Illinois Use Tax Act. The tax in question is imposed directly on the purchaser or user in the premises; it is the purchaser's or user's sole liability. The retailer's role is, in any event, merely that of a collector for the State. *Turner* v. *Wright* (Sup. Ct., Ill., 1957), 11 Ill.(2d) 161, 142 N.E.(2d) 84; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 81 L.Ed. 814; *Felt & Tarrant Mfg.*

Co. v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *McLeod* [fol. 50] v. *Dilworth Co.* (1944), 322 U.S. 327, 88 L.Ed. 1304; *General Trading Company* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309. There is nothing in the Illinois Use Tax Act that ever has constituted or now constitutes a retailer as a "taxpayer".

It is manifest that, in the premises, National Bellas could not be and was not served with purported process herein, pursuant to Section 12a, Illinois Use Tax Act, as a "taxpayer". In such circumstance, the certified mailing of such purported process by plaintiff to National Bellas on or about January 23, 1964, was and is a nullity. There is no provision in that Section or any other statute for any such purported service of process on a "retailer".

The attempted service of process herein on the Secretary of State on January 13, 1964, also is a nullity. With regard to a non-resident retailer, Section 12a, Illinois Use Tax Act, is vague and indefinite, insofar as service of process is concerned. The purported service of process on the Secretary of State requires him to do nothing in the premises. He merely files it and does nothing regarding the notification of the alleged defendant (Nat'l. Bellas Special Appear. and Mot., filed Nov. 27, 1963, pp. 3-4). Compare with the pertinent provisions of Section 111, Illinois Business Corporation Act (32 S.H.A., §157.111) and Section 17, Illinois Civil Practice Act, regarding ser- [fol. 51] vice of process on foreign corporations authorized to transact business in Illinois and on non-resident defendants, respectively.

If Sections 2 and 12a, Illinois Use Tax Act, are construed to apply to National Bellas in the attendant circumstances, such statutory provisions, jointly and severally, are repugnant to and in violation of the due process requirements of Section 1, 14th Amendment, Constitution of the United States and of Section 2, Article II, Constitution of Illinois. In sum, such statutory construction renders those provisions of the Illinois Use Tax Act

unconstitutional and of no force and effect whatsoever, insofar as National Bellas is concerned.

None of the line of cases pertaining to a State use tax and the imposition of collection liability therefor on vendors engaged in interstate commerce has, to date, been concerned with the jurisdictional due process issue inherent in an *in personam* action, such as the case at bar. Such line of cases reveals, on careful scrutiny of the facts and the law, that either the vendor in question submitted to the State court's jurisdiction in the premises or the particular action was one *in rem* or *quasi in rem*. See, in this regard, *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U.S. 359, 85 L.Ed. 888; *Nelson* v. *Montgomery* [fol. 52] *Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897; *General Trading Co.* v. *State Tax Comm'n.* (1944), 322 U.S. 335, 88 L.Ed. 1309; *Miller Brothers Co.* v. *Maryland* (1954), 347 U.S. 340; 98 L.Ed. 744; and *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660.

It is fundamental in the system of government in the United States that Illinois, as one of the several sovereign States comprising the United States, is not empowered or authorized to exercise *in personam* jurisdiction on a nationwide basis. Equally basic is the fact that jurisdiction over National Bellas' person does not follow as a necessary circumstance of Illinois jurisdiction to apply local law to the controversy herein. Traditional territorial restrictions on a State's *in personam* jurisdiction are not a dead letter of the law. To hold otherwise in the circumstances before the Court here is to invite a return to the chaos in interstate commerce that existed in the United States, prior to the adoption of the Constitution by the States in 1789, under the Articles of Confederation.

Although the Supreme Court of the United States appears to have enlarged the concept of State *in personam* jurisdiction over foreign corporations in interstate commerce in the series of cases from *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, 90 L.Ed. 95, to *McGee*

v. *International Life Insurance Co.* (1957), 355 U.S. 220, 2 L.Ed.(2d) 223, each of those cases is clearly distinguish-
[fol. 53] able on the facts from National Bellas' situation herein. As the Supreme Court pointedly stated, with regard to a State's *in personam* jurisdiction over non-residents, in the later case of *Hanson* v. *Denckla* (1958), 357 U.S. 235, 2 L.Ed.(2d) 1283, 1296:

> "• • • . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418, 1 L ed 2d 1456, 77 S Ct 1360. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. • • • ."

Manifestly, Illinois has sought to evade the constitutional inhibition against extra-territorial process in an *in personam* proceeding, like that attempted by it against National Bellas herein, by a bootstrap legislative maneuver. The bootstrap, which must fail in the attendant circumstances, is the artificial definition of "maintaining a business in this State" set forth in Section 2, paragraph 2, Illinois Use Tax Act, *supra,* which was added to that Section by the Act of July 17, 1961 (120 S.H.A., §439.2, as amended). Such failure is inherent in the pertinent decisions of the Illinois Supreme Court in *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d) 426, 158 N.E.(2d) 73, and the United States Court [fol. 54] of Appeals for the Seventh Circuit in *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821.

In the *Grobark* case, the Illinois Supreme Court held that, when a New York corporation, with no agents or offices in Illinois, contracted from without Illinois and shipped goods into Illinois by means of an independent carrier, such non-resident vendor was not transacting business in Illinois, so as to constitute an act subjecting it to the jurisdiction of an Illinois court. In that case, the Superior Court of Cook County quashed service of summons on defendant Addo Machine Company and its order was affirmed by the Illinois Appellate Court, First District. The Illinois Supreme Court, in affirming the Superior Court and the Appellate Court, stated, in pertinent part, that (158 N.E.(2d) 79):

> "In the instant case, Addo contends that it has not subjected itself to the jurisdiction of the Illinois courts. Hanson v. Denckla, setting out limitations on a State's power in *in personam* jurisdiction, supports this contention.
>
> "In the present case, the record shows that the defendant, Addo Machine Company, Inc., is a corporation organized conformably to the laws of the State of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees or other persons within the State. From May 19, 1953, de-[fol. 55] fendant, pursuant to the letter of that date addressed to plaintiffs, began to sell its machines to plaintiffs at a distributor discount rate. The sales were consummated when plaintiffs placed orders with the defendant in New York, and defendant accepted the orders, delivering its product to independent carriers in New York. On or about July 1, 1955, defendant advised plaintiffs that beginning October 1, 1955,

they would no longer be exclusive distributors of defendant's products in the Greater Chicago Trading Area, and after the latter date defendant sold its machines at a distributor level and to the individual defendants and to other distributors. Defendant did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors; the relationship between defendant and distributor being that of seller and purchaser. After October 1, 1955, the defendant continued to sell equipment to plaintiffs on a dealer price level until January 1, 1956, when it declined to accept any further orders from plaintiffs.

"• • • • •.

"As recently announced by the United States Supreme Court, in the Hanson case, there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts."

The United States Court of Appeals ruled in the *Trippe* case that, when a New Jersey corporation, with its sole place of business in that State, engaged in the mail order business, including the mailing of catalogues to residents of Illinois, where it was not licensed to do business, and conducted no other business in Illinois, such non-resident vendor was not transacting business in Illinois, so as to [fol. 56] constitute an act subjecting it to the jurisdiction of an Illinois court or to Illinois' non-resident jurisdictional statute in an action brought by an Illinois corporation in the United States District Court in Illinois. In reversing the United States District Court, which had recommended immediate interlocutory appeal pursuant to 28 U.S. Code, §1292(b), and directing the quashing of

service of summons and dismissal of the complaint and action for lack of jurisdiction, the Court of Appeals stated, in pertinent part, that (270 F.(2d) 822-823):

"Plaintiff argues that defendant submitted itself to the jurisdiction of Illinois courts because defendant's activities in mailing catalogs into Illinois came within the provisions of §17 of the Illinois Civil Practice Act. • • •.

"The first question for us to consider is whether defendant, by sending catalogs into Illinois through the mail, was engaged in the transaction of any business within the State of Illinois.

"Plaintiff cites McGee v. International Life Insurance Company, 1957, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed. 2d 223. However, we think the more recent case of Hanson v. Denckla, 1958, 357 U.S. 235, 252-253, 78 S. Ct. 1228, 2 L.Ed. 2d 1283, demonstrates the McGee case has been limited by the Court to the insurance field. • • •.

"The Illinois statute heretofore quoted [Ill. Civ. Prac. Act, §17], as well as similar non-resident jurisdictional statutes in other states, have, since the time of Pennoyer v. Neff, 1877, 95 U.S. 714, 24 L.Ed. 565, widened considerably the bases for service on non-resident defendants in *in personam* suits. However, there still remain important limitations on a state's power to extend jurisdiction beyond its territorial limits. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, [fol. 57] 2 L.Ed. 2d 1283; Orton v. Woods Oil & Gas Co., 7 Cir., 249 F.2d 198; Grobark v. Addo Machine Co., Inc., 16 Ill. 2d 426, 158 N.E.2d 73. We think the Grobark case is controlling on the point we are now considering. It is the last word we have from the Illinois Supreme Court. • • •.

"• • • • •.

"Plaintiff would minimize the importance and the pertinency of the Grobark decision stating that the

Court there would not take *in personam* jurisdiction where the defendant had conducted 'no economic activity of any consequence in the forum'. We do not think the case can be distinguished on that ground. * * *. We think there was much more economic activity in the Grobark case than in the case before us, yet the Illinois Supreme Court determined that the defendant's contacts in Illinois in Grobark were insufficient for the purposes of assuming jurisdiction.

"We hold that under Illinois law, defendant did not have those 'minimal contacts' which are essential to the transaction of any business within the state of Illinois.

"Plaintiff also contends that by mailing into Illinois catalogs which contained false statements, defendant committed a tortious act within Illinois. We think the answer to this claim is that defendant did not perform any act in the State of Illinois, tortious or otherwise."

It must be pointed out that convenience furnishes no basis for determination of the jurisdiction of any State court or any other court. There never has been and there now is not a doctrine of *forum conveniens* in the law. The familiar doctrine of *forum non conveniens* is only for declining jurisdiction, if a court already has it, and not for gaining jurisdiction. For a foreign corporation to be subject to a State's laws, including process, it must be acting [fol. 58] in the State through the corporation's agents or servants. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.* (1925), 267 U.S. 333, 69 L.Ed. 634, the Supreme Court of the United States ruled that action of an independent contractor in a State will not subject a foreign corporation to that State's laws. Patently, in carrying the mail, as it does for National Bellas in distribution of catalogues, the United States is an independent contractor. No State is empowered or authorized to extend its laws beyond its borders to out-of-state conduct merely to afford a more convenient judicial forum to itself or its people. To hold

otherwise, as Illinois appears to seek herein, is to fly in the very teeth of the due process provisions of the Constitution of the United States and the Illinois Constitution.

Pursuant to Section 20(2), Illinois Civil Practice Act, there are appended hereto and made a part hereof, as fully as though they were set out, *in extenso,* here, the supporting affidavits of National Bellas' vice-president, Aaron Maer, and of its general counsel, Herman A. Benjamin.

Dated: March 24, 1964.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 59]

AFFIDAVIT TO SPECIAL APPEARANCE, ETC.

IN THE CIRCUIT COURT OF COOK COUNTY

AT LAW

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

State of New York,
County of New York, ss:

Aaron Maer, being duly sworn, deposes and says:

That he is a Vice-President of National Bellas Hess, Inc., a corporation, (named herein as "National Bellas

Hess, Incorporated",) the defendant in the within proceeding.

This affidavit is made in support of the Company's Special Appearance and the motion of its Counsel to set aside and quash service and/or to dismiss the complaint herein.

Your deponent in his capacity as Vice-President is personally familiar with the facts herein, having acquired his information, as hereinafter set forth in the course of his duties.

National Bellas Hess, Inc. is a Delaware corporation, duly qualified to do business, doing business, and with its sole place for the doing of business, within the State of Missouri; it has not qualified or registered to do business in Illinois; nor, in fact, in any state other than Delaware and Missouri. It has no registered agent in Illinois, and has not authorized any person to act as its agent, either to receive process, or accept service, or apply for, receive or accept any licenses or permits, in Illinois.

[fol. 60] National Bellas Hess, Inc. is a national mail order company which issues a number of catalogs during the year. There are issued annually two main catalogs ("Spring & Summer; and "Fall & Winter") and a number of intermediate smaller "sales books", or "flyers". Catalogs, sales books and flyers are disseminated to customers and potential customers solely and entirely through the use of the United States mails.

They are mailed only, always, from North Kansas City, Missouri. They are not shipped by truck or otherwise to any other mailing point, as some companies do. The company's only plant is located in North Kansas City, and all its mail order activities are carried on there, except for purchasing, which is done in the first instance by a wholly owned New York subsidiary, in New York City.

The catalogs present a wide variety of merchandise, at retail. A main catalog contains approximately 4000 different items, and is mailed to the Company's own list of customers, maintained by it in Kansas City. This list was

originally acquired from a predecessor Company in 1932, and then consisted of about 5,000,000 names. As time goes on, and customers fail to order, their names are weeded out. As new customers are secured, their names are added. A "Catalog" (using this designation for one of the two main books, to distinguish it from all other smaller books, hereafter referred to as "flyers") is too costly to distribute casually, or carelessly. It is sent only to active, recent customers, who have ordered a minimum amount of merchandise within a specified time, and is mailed to customer [fol. 61] by name, from his stencil. Flyers are also mailed thus, but to a less restricted list. They may also occasionally be mailed in bulk, or addressed to "occupant" (here the local postmaster delivers as indicated) or, as is more usual, enclosed in the parcels sent to customers in filling orders from a prior flyer or catalog. In any case, it will be noted, the mails are employed; and the mailing is from the only location where the Company has warehouses and assembly and distribution points, to wit—North Kansas City, Missouri. Thus sales to Illinois residents are filled from the only warehouses we have, which are all in North Kansas City. They are shipped by the cheapest available method of transportation, which in most cases is mail, but occasionally it could be railway express for a bulky item or for one which is too large for the receiving post office to handle. If a customer should specify any particular method of shipment, it would be followed if possible. However, in no case would it be sent except by common carrier; we ourselves have no trucks delivering in Illinois or anywhere else, for that matter.

Orders from customers are received only in its office, plant and warehouse in North Kansas City, Missouri and in no other location, and all normal correspondence in connection with such orders with customers, the review and acceptance of such orders, and the filling of such orders are made from one of its warehouses and plants in Kansas City.

The Company does not maintain, keep or use, nor has it ever in the past maintained, kept or used, permanently or temporarily, directly or indirectly, or through any agent, any office, branch, place of distribution, sales or sample room, warehouse or storage place in Illinois. The defendant does not have nor has it ever had any representative, agent, salesman, canvasser or solicitor operating in the State of Illinois for the purpose of selling or taking orders for tangible personal property, or delivering the same, or [fol. 62] accepting payments or servicing any of the products it sold.

It owns no tangible property in the State of Illinois whether realty or personalty.

It owns no motor vehicles in the State of Illinois, nor does it hold any licenses for motor vehicles in the State of Illinois.

It does not prepare or supply any advertising displays for use in Illinois and does not advertise its products for sale in newspapers, billboards, radio or TV within the State of Illinois.

It has brought no suits in the State of Illinois.

In brief, the defendant maintains no place of business in Illinois and is not qualified to do, nor is it doing, business in, the State of Illinois.

Aaron Maer

Sworn to before me, this 23rd day of March, 1964.

Rose Crystal, Notary Public, State of New York, No. 24-5871100, Qualified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1964.

[fol. 63]

AFFIDAVIT TO SPECIAL APPEARANCE, ETC.

IN THE CIRCUIT COURT OF COOK COUNTY

At Law

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

State of New York,
County of New York, ss:

Herman A. Benjamin, being duly sworn, deposes and says:

That he is a member of the Bar of the State of New York, duly admitted to practice in the State of New York in 1926; that he is General Counsel for National Bellas Hess, Inc., (a corporation, named herein as National Bellas Hess, Incorporated,) the defendant in the within proceeding, and as such General Counsel has familiarized himself with the relevant facts herein.

That he makes this affidavit to support the Company's Special Appearance and the motion of Leibman, Williams, Bennett & Baird, its Counsel specially retained for that purpose, to set aside and quash service and/or to dismiss the complaint herein; and to supplement in certain details which are not within the purview of the duties of Aaron Maer, a Vice-President of the defendant corporation, the affidavit of said Aaron Maer concerning the subject matter hereof.

Defendant corporation is a Delaware corporation, qualified to do business in the State of Missouri and in no other jurisdiction. It maintains no place of business in Illinois.

[fol. 64] Not being subject to the Income Tax provisions of the State of Illinois, nor to the other statutes hereinafter mentioned, it does not and has not filed any Illinois income tax, nor other Illinois tax returns. The Company has not registered under the Retailers Occupation Tax Act and holds no Certificate of Registration under the Illinois Use Tax Act. It has never made application for such Certificate of Registration, nor has it ever received any such Certificate of Registration, and your deponent avers that to the extent that the complaint alleges that the defendant was issued a Certificate of Registration, that if such Certificate was issued, it was not done "as provided by law" as therein stated, for the reason that no application has ever been made therefor; and deponent affirms also that no such Certificate of Registration has ever been received.

The defendant has never registered under the Illinois Use Tax Act or offered security to insure collections under §6 of said Act; the defendant (which must be considered a non-resident, for purposes of §12a of the Illinois Use Tax Act) does not maintain a place of business in Illinois; it has never been a resident who "subsequently removed from" the State of Illinois, nor is it a "user" within the term of that Statute.

Herman A. Benjamin

Sworn to before me this 23rd day of March, 1964.

Rose Crystal, Notary Public, State of New York, No. 24-5871100, Qualified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1964.

[fol. 65]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

LAW DIVISION

General No. 63C21015

DEPT. OF REVENUE, ETC., Pltf.,

v.

NAT'L BELLAS HESS, INC., Dft.

ORDER DENYING MOTION TO QUASH SERVICE—May 20, 1964

This cause having come on to be heard on the special appearance of National Bellas Hess, Incorporated and its motion to set aside and quash service of alias summons, etc., filed herein on March 24, 1964, and plaintiff having appeared by its attorney, and National Bellas Hess, Incorporated, having appeared specially, by its attorney, and the Court having been fully advised in the premises,

It Hereby Is Ordered that:

(1) The motion of National Bellas Hess, Incorporated to set aside and quash service of alias summons, filed herein on March 24, 1964, be, and the same hereby is, denied by the Court; and

(2) National Bellas Hess, Incorporated be, and it hereby is, granted to and including 30 days from the date of entry of this Order herein, within which to appear generally herein and also to move with respect to, answer, or otherwise plead to the complaint, as amended, herein.

Enter:

William V. Brothers, Judge.

[File endorsement omitted]

[fol. 69]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

[Title omitted]

MOTION OF DEFENDANT NATIONAL BELLAS HESS, INCORPORATED TO STRIKE OR DISMISS COMPLAINT—Filed June 23, 1964

Now comes defendant National Bellas Hess, Incorporated, by its attorneys, Leibman, Williams, Bennett and Baird, appearing herein pursuant to the Court's Order of May 20, 1964 and without waiver of or prejudice to such defendant's right to persist in and maintain its objection to the Court's jurisdiction over its person, and moves the Court to strike or dismiss plaintiff's Complaint herein for the following reasons:

1. The allegations in Paragraph 1 of the Complaint that "on or after August 1, A.D. 1955, and before the filing of this Complaint, the defendant National Bellas Hess, Incorporated, was engaged in soliciting orders within the [fol. 70] State of Illinois from users by means of catalogues or other advertising, as a retailer of tangible personal property" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

2. The allegations in Paragraph 2 of the Complaint that "in accordance with Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes—in relation to the tax upon the privilege of using tangible personal property in the State of Illinois, it was the duty of the said defendant to pay the tax to the plaintiff, at the rate and in the amount provided by

statute" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

3. The allegations in Paragraph 3 of the Complaint "that although the defendant corporation is incorporated in another state and has its principal place of business outside the State of Illinois, the defendant was issued a certificate of Registration, number 953 777 by the Department of Revenue of the State of Illinois, as provided by law" should be stricken by the Court. They are argu- [fol. 71] mentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

Furthermore, plaintiff's allegations in Paragraph 3 of the Complaint, which defendant seeks to have stricken by the Court, attempt to mislead the Court with the false impression that, "although the defendant corporation is incorporated in another state and has its *principal* place of business outside the State of Illinois" (italics supplied), it has had, at the times material herein, and still has an actual and existing place of business within Illinois. Section 41, Illinois Civil Practice Act. Plaintiff has, at all times material herein, known and now knows that defendant has not, at any time material herein, had and now does not have any place of business in Illinois. It also has, at all times material herein, known and now knows that defendant, admittedly a foreign corporation, has not, at any time material herein, qnalified and now is not qualified to do business in Illinois, since defendant has not, at any time material herein, transacted and now does not transact business within Illinois within the meaning of the Illinois Business Corporation Act, as amended. See, Illinois Business Corporation Act, as amended, Sections 102 *et seq.* (32 S.H.A., §§157.102 *et seq.*); *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d)

426, 158 N.E.(2d) 73; *Trippe Manufacturing Company* v. [fol. 72] *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821.

4. The allegations in Paragraph 4 of the Complaint that "in accordance with the provisions of Section 3 of the said Use Tax Act, it was the duty of the defendant to file a return with the plaintiff for each month the defendant was engaged in the said business, showing among other things the total amount of gross sales of all tangible personal property made at retail by the defendant within the State of Illinois during each preceding calendar month and the amount of tax due thereon to the plaintiff, and to pay said tax to the plaintiff" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

5. The allegations in Paragraph 5 of the Complaint that, "in accordance with the Use Tax Act plaintiff did determine the amount of tax due from the defendant to the plaintiff for certain months according to its best judgment and information for which months no returns were filed by the defendant with the plaintiff and the latter did thereupon notify the defendant on the 21st day of January, A.D., 1963, by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, and a copy to the Secretary [fol. 73] of State of the State of Illinois, of the amount due upon the returns as corrected and of the amount of the delinquency computed for months wherein no returns were made, stating that it proposed to assess such amount, with penalties, in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18), photostatic copies of which proposed assessment and the certificate of mailing are attached hereto and marked plaintiff's Exhibits and made a part hereof" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper

and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

Furthermore, plaintiff's allegations in Paragraph 5 of the Complaint, which defendant seeks to have stricken by the Court, are unduly prolix and fail to comply with the pertinent provisions of Section 33, Illinois Civil Practice Act.

6. The allegations in Paragraph 6 of the Complaint that "the defendant did not file a protest to said proposed assessment and did not request a hearing thereon within twenty (20) days after said notice of proposed assessment and thereupon the plaintiff made a final assessment of the amount of tax and penalties proposed against the defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18)" should be stricken by the Court. They are argumentative and are [fol. 74] conclusions of law and fail to plead ultimate facts required for proper and precise pleading of a complaint, Section 33, Illinois Civil Practice Act.

7. The allegations in Paragraph 7 of the Complaint that, "on the 26th day of June, A.D., 1963, plaintiff mailed to the defendant by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, notice of final assessment, photostatic copies of said notice of final assessment and the certificate of mailing being attached hereto, and a copy to the Secretary of State of the State of Illinois, and made a part hereof, marked plaintiff's Exhibits" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

8. The allegations in Paragraph 8 of the Complaint that "the said defendant has not paid any sum on account" should be stricken by the Court. They are vague and ambiguous and are argumentative and fail to plead ultimate

facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

[fol. 75] 9. The entire Complaint, purporting to seek collection of Illinois use taxes and penalties from defendant, a non-resident vendor, which has not, at any time material herein, and now does not have a place of business within Illinois and which has not, at any time material herein, transacted and now does not transact business within Illinois, should be stricken and dismissed by the Court. It fails to allege material allegations of ultimate fact required to plead a claim or cause of action, upon which relief can be granted by the Court.

(a) Defendant has not, at any time material herein, engaged and now is not engaging in any business other than interstate commerce, as a non-resident, with Illinois. Its privilege to engage in such interstate commerce is not extended by the laws of Illinois. It is provided by the United States pursuant to the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3).

(b) Defendant has not, at any time material herein, distributed and now does not distribute its catalogues to Illinois addressees except by United States mail from without the State. Such use of the mails is not a "privilege" granted by Illinois. It is a property right of defendant and within the exclusive jurisdiction of the United States (U.S. Const., Art. I, §8, cl. 7; *Hoover* v. *McChesney* (Cir. Ct., D. Ky., [fol. 76] 1897), 81 Fed. 472, 477-478, 480-481; *Maxwell* v. *United States* (C.A. 8, 1956), 235 F.(2d) 930.

(c) Defendant has not, at any time material herein, been and now is not a "taxpayer" within the meaning of the Illinois Use Tax Act. The Illinois use tax is imposed di-

rectly on the purchaser or user in the premises. It is the purchaser's or user's sole liability. The retailer's role under the Illinois Use Tax Act is, in any event, merely that of a collector for the State. *Turner* v. *Wright* (Sup. Ct., Ill., 1957), 11 Ill.(2d) 161, 142 N.E.(2d) 84; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 81 L.Ed. 814; *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *McLeod* v. *Dilworth Co.* (1944), 322 U.S. 327, 88 L.Ed. 1304; *General Trading Company* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309. To the same effect, see Rule 7, Par. 1, Ill. Dept. of Rev. Use Tax Rules. There is nothing in the Illinois Use Tax Act that ever has constituted or now constitutes a retailer as a "taxpayer".

(d) The issue sought to be raised by the Complaint herein is manifestly one of Illinois' jurisdiction to impose a tax—the Illinois use tax—on defendant. Such issue can not be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection. The State of Illinois [fol. 77] lacks power to lay such use tax on defendant in the attendant circumstances. *Miller Brothers Co.* v. *Maryland* (1954), 347 U.S. 340, 98 L.Ed. 744. Cf. *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher, supra; Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U.S. 359, 85 L.Ed. 888; *Nelson* v. *Montgomery Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897; *McLeod* v. *Dilworth Co., supra; General Trading Co.* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309; and *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660.

(e) In *Nelson* v. *Sears, Roebuck & Co., supra,* where the vendor, unlike defendant herein, submitted to the State

court's jurisdiction in the premises, the Supreme Court of the United States succinctly indicated that the Iowa use tax in question could not and would not be applied to mail order business of non-resident vendors in defendant's situation. In that case, respondent Sears, Roebuck & Co., a New York corporation authorized to do business in Iowa, operated retail stores therein. It contested the constitutionality of the Iowa use tax sought to be imposed on it for orders mailed directly to its out-of-state branches and shipped directly therefrom to the vendees in Iowa by mail or common carrier.

The Supreme Court of the United States, upholding the Iowa use tax in such circumstances, stated, *inter alia,* that (85 L.Ed. 892):

> [fol. 78] . "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in Monamotor Oil Co. v. Johnson, 292 US 86, * * *, and Felt & T. Mfg. Co. v. Gallagher, 306 US 62, * * *. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power'. * * *. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the

full benefits flowing from its Iowa business. * * *. Respondent can not avoid that burden though its business is departmentalized. * * *.

"* * * *.

"Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. *But those other concerns are not doing business in the state as foreign corporations.*[1] *Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price.* * * *. (Italics supplied)

[fol. 79] (f) In *Miller Brothers Co.* v. *Maryland, supra,* the State court's jurisdiction over the vendor, unlike defendant herein, purportedly was gained by attachment of such vendor's truck, which was found in Maryland: Appellant Miller Brothers Co., a Delaware corporation not authorized to do business in Maryland, sold directly to its vendees at its sole place of business in Delaware. Although most of such purchases were carried away by the vendees, some were delivered by common carrier or by the vendor's trucks. Maryland sought to compel the vendor to collect its use tax on such sales to Maryland vendees. Its courts ruled in its favor.

Reversing the Maryland Court of Appeals, the Supreme Court of the United States held that, to satisfy the due process requirements of the 14th Amendment of the Con-

---

[1] To the same effect, see *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d) 426, 158 N.E.(2d) 78, and *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821, which are set forth in defendant's Special Appearance and Motion to Set Aside and Quash Service of Alias Summons, etc. herein, pp. 12-16.

stitution of the United States, there must exist "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (98 L.Ed. 748). That link, that connection, was found to be absent in the *Miller Brothers Co.* case by the Supreme Court. They are lacking in this case, too. Cf. the *Grobark* case, wherein the Illinois Supreme Court held that a non-resident vendor with no agents or offices in Illinois, which had contracted from without Illinois and shipped goods into Illinois by means of an independent carrier, did not have the required "minimum contacts" with the State of Illinois to confer jurisdiction on its courts (158 N.E.(2d) 79).

[fol. 80] The facts in the *Trippe* case, cited in footnote 1, *supra*, are on all fours with defendant's situation herein. In that case, the vendor, a New Jersey corporation, with its sole place of business in that State, engaged in the mail order business, including the mailing of catalogues to Illinois residents. Such vendor was not licensed to do business and conducted no other business in Illinois. The United States Court of Appeals for the Seventh Circuit ruled that the non-resident vendor was not transacting business in Illinois, so as to constitute an act subjecting it to the jurisdiction of an Illinois court or to Illinois' non-resident jurisdictional statute. In finding the absence of a due process *nexus*, the Court of Appeals declared, *inter alia*, that (270 F.(2d) 822-823):

> "The first question for us to consider is whether defendant, by sending catalogs into Illinois through the mail, was engaged in the transaction of any business within the State of Illinois.
>
> "• • • • • • •
>
> "• • •. We think there was much more economic activity in the Grobark case than in the case before us, yet the Illinois Supreme Court determined that the defendant's contacts in Illinois in Grobark were insufficient for the purposes of assuming jurisdiction.
>
> "We hold that *under Illinois law, defendant did not have those 'minimal contacts' which are essential to the*

transaction of any business within the state of Illinois.

"Plaintiff also contends that by mailing into Illinois catalogs which contained false statements, defendant [fol. 81] committed a tortious act within Illinois. We think the answer to this claim is that *defendant did not perform any act in the State of Illinois, tortious or otherwise.*" (Italics supplied.)

(g) The *Miller Brothers Co.* case, *supra,* plainly established the rule that the irreducible minimum of activity, which is required to exist before a State can make a non-resident vendor a collector of its use tax, is such vendor's solicitation in the State by traveling solicitors based without such State. The Supreme Court of the United States held that the vendor's delivery in the State, even by its own trucks, was not sufficient. It also found that such vendor's advertising, which was projected into Maryland from Delaware by radio, newspapers, and sales circulars mailed to customers, did not supply the required "minimal contacts" in the premises.[2]

(h) The most recent word from the Supreme Court of the United States regarding the liability of a non-resident [fol. 82] vendor for a State use tax is found in *Scripto, Inc.*

---

[2] Maryland attempted, in the *Miller Brothers Co.* case, to equate such advertising with the physical presence of solicitors within the State. Manifestly, it misunderstood the second ground of the opinion of the Supreme Court of the United States in *Nelson* v. *Montgomery Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897, which is set forth at 85 L.Ed. 899. In referring to advertising within Iowa as a second ground for upholding Iowa's jurisdiction to compel collection of its use tax, the Supreme Court did not hold that advertising is the jurisdictional equivalent of physical presence in the State, but that such advertising was done by Montgomery Ward's local Iowa retail stores and resulted in tying its interstate sales, although very loosely, to its intrastate business in Iowa. Cf. the so-called "vortex principle" later enunciated by the Supreme Court in *Norton Company* v. *Department of Revenue* (1951), 340 U.S. 534, 95 L.Ed. 517, involving the imposition of the Illinois retailer's occupation tax on a foreign corporation on the basis of gross receipts from all sales to Illinois vendees.

v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660. In that case, the State court's jurisdiction over the vendor, unlike defendant herein, was attained by attachment of such vendor's accounts receivable in Florida. Appellant Scripto, Inc., a Georgia corporation, was required to collect the Florida use tax from its customers in that State because of its solicitation of sales within Florida by independent brokers, who were residents of the State. In sustaining the imposition of the use tax liability in the premises, the Supreme Court distinguished the *Miller Brothers Co.* case, *supra*, by pointing out that the vendor therein, which advertised by radio, newspapers, and mailed sales circulars that reached its Maryland customers, did not physically go into that State to make sales. Patently, the Supreme Court's decision in the *Scripto, Inc.* case does not overrule its holding in the *Miller Brothers Co.* case and is neither pertinent nor applicable to defendant's circumstances herein.

(i) The attempted imposition of the Illinois use tax on defendant herein is invalid, because it is repugnant to and violates the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3). To hold otherwise in the circumstances before the Court is to invite a return to the chaos in interstate commerce that existed in [fol. 83] the United States under the Articles of Confederation prior to the adoption of the Constitution by the States in 1789. The Constitution's framers sought to and did eliminate the barriers to freedom of movement across state borders, which had been erected earlier by the States. They accomplished their objective by giving exclusive power to the Congress to "regulate Commerce with foreign Nations, and among the several States" in the interstate commerce clause. *Gibbons* v. *Ogden* (1824), 9 Wheat. (U.S.) 1, 6 L.Ed. 23; *Hood* v. *DuMond* (1949), 336 U.S. 525, 533-535, 93 L.Ed. 865, 871-878.

Since *Cooley* v. *Board of Port Wardens* (1851), 12 How. (U.S.) 299, it has been manifest that the interstate commerce clause of the Constitution does not, perforce, preclude all regulation by a State of movement across its

borders. See, for example, *South Carolina State Highway Department* v. *Barnwell Bros.* (1938), 303 U.S. 177; *California* v. *Thompson* (1941), 313 U.S. 109; *Kane* v. *New Jersey* (1916), 242 U.S. 160; *Hess* v. *Pawloski* (1927), 274 U.S. 352; *Hendrick* v. *Maryland* (1915), 235 U.S. 610; *Capitol Greyhound Lines* v. *Brice* (1950), 339 U.S. 542; and *Fry Roofing Co.* v. *Wood* (1952), 344 U.S. 157.

However, a State's regulatory power in the premises has recognized limits. It may not be invoked to exact a tax for the privilege of doing interstate business. *Spector Motor* [fol. 84] *Service* v. *O'Connor* (1951), 340 U.S. 602, 608-609. The State can not levy a tax "upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." *Memphis Natural Gas Co.* v. *Stone* (1948), 335 U.S. 80, 88-89. It is especially obnoxious for a State to attempt to exercise its regulatory power in a manner to protect its local economy from the effect of interstate commerce. *Buck* v. *Kuykendall* (1925), 267 U.S. 307; *Bush* v. *Maloy* (1925), 267 U.S. 317; *Baldwin* v. *Seelig* (1935), 294 U.S. 511; *Hood* v. *DuMond, supra.*

In *Baldwin* v. *Seelig, supra,* the Supreme Court of the United States, explaining the basic purposes of the interstate commerce clause of the Constitution, pointedly stated (294 U.S. 527):

> "* * * *. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. * * * *."

[fol. 85] To the same effect, see *Freeman* v. *Hewitt* (1946), 329 U.S. 249, 254, and *McLeod* v. *Dilworth Co.* (1944), 322 U.S. 327, 330-331.

The Illinois use tax may be imposed on the user within the State, even though the sale to such user is not, *per se*, subject to tax. *Henneford* v. *Silas Mason Co., supra.* However, the problem is this case involves not Illinois' power to tax the user, but its power to impose the tax on the vendor, defendant herein. Where, as here, such vendor is not qualified to do business in Illinois and engages in no activities in the State except its interstate mail order business, Illinois can not impose on defendant a liability for the use tax, which admittedly the State may properly collect from Illinois vendees. No case can be cited to support so broad an exercise of State power.

It is clear, beyond a peradventure of doubt, that defendant, as a non-resident vendor which confined its activities strictly to Missouri, could not be made liable for the Illinois use tax. If defendant were to cease making deliveries, by mail or otherwise, to its vendees, manifestly Illinois could not assert a right to hold defendant liable for use taxes, even though such vendees used the purchases in Illinois. Accordingly, the Missouri vendor, who makes no deliveries across state lines, is immune. In sum, the Illinois use tax can be avoided by defendant herein by the mere expedient of not engaging in interstate commerce. It [fol. 86] is that very suppression if interstate movement that the use tax was designed to achieve and the interstate commerce clause was fashioned to prevent. The Constitution of the United States prohibits the State of Illinois from conditioning the use of the mails or any other channel of interstate commerce in the manner and by the means attempted herein.

Defendant's objection to paying the Illinois use tax herein is based both on its burdensome effect and on its invalidity as a direct tax on interstate commerce. In such circumstances, the amount of the tax is immaterial. *Spector Motor Service* v. *O'Connor* (1951), 340 U.S. 602, 608-

609. As Mr. Justice Frankfurter observed in *Memphis Natural Gas Co.* v. *Stone, supra,* in his dissent therein (335 U.S. 103-104):

> "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one.' * * * ."

However, it is fact that the Illinois Use Tax Act lays a heavy burden on the vendor. See, for example, Sections 8, 11, 12, and 14 of such Act (120 S.H.A., §§439.8, 439.11, 439.12, and 439.14) and also the several Sections of the Illinois Retailer's Occupation Tax Act, which are set forth in Section 12 of the Use Tax Act and are made applicable thereby to a vendor subject to the use tax.

[fol. 87] (j) The attempted imposition of the Illinois use tax on defendant herein also is invalid, because it is repugnant to and violates the due process clause of the 14th Amendment of the Constitution of the United States (U.S. Const., 14th Amend., §1). To hold defendant liable for collection of the Illinois use tax in the attendant circumstances would be without precedent. The analogy of *Norton Company* v. *Department of Revenue of the State of Illinois* (1951), 340 U.S. 534, 95 L.Ed. 517, offers instruction in the premises. In that case, the Supreme Court of the United States held that Illinois had no power to include within the measure of its gross receipts tax, that is, its retailer's occupation tax, the proceeds of orders sent directly by Illinois customers to the vendor's Massachusetts home office, from which the ordered goods were shipped directly to such customers. The Supreme Court did hold that Illinois could include within the measure of such tax the proceeds of sales that used the vendor's Illinois place of business to receive orders or to distribute goods. It rejected the minority's argument that all proceeds of the vendor's sales in Illinois could reasonably be attributed to its local activities in the State. Clearly, defendant's activities with regard to Illinois are too remote

and insufficient to meet the due process requirements for valid imposition of the Illinois use tax upon it.

[fol. 88] It is indisputable that the State of Illinois has ample authority to collect its use tax from its own residents. Manifestly, for its own convenience, it has seen fit to reject its own efforts to collect such tax in the situation herein and, in lieu thereof, to seek to impose its own burden, unconscionably and without warrant in fact or in law, on non-resident vendors, such as defendant, transacting interstate commerce only. In the circumstances herein, there is basically the "impotence of state power", which, the Supreme Court of the United States emphasized in *Wisconsin* v. *J. C. Penney Co.* (1941), 311 U.S. 435, 444, stems from the Constitution of the United States. As in that case, it is clear herein that, with "the limits on the otherwise autonomous powers of the states" set forth in the Constitution, the "state power has nothing on which to operate" (*Wisconsin* v. *J. C. Penney Co., idem*).

Dated: June 19, 1964

Leibman, Williams, Bennett and Baird, By: Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 89]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

General No. 63C21015

DEPT. OF REVENUE, ETC.

v.

NATIONAL BELLAS HESS, INC.

ORDER DENYING MOTION TO STRIKE OR DISMISS—
June 23, 1964

This cause having come on to be heard by this Court on the Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, and plaintiff and defendant having appeared by their respective attorneys, and the Court having been advised in the premises

It Hereby Is Ordered that:

(1) The Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, filed herein on June 19, 1964, be, and the same hereby is, denied; and

(2) Such defendant be, and it hereby is, granted leave to and including July 23, 1964, within which to answer the Complaint herein.

Enter:

William V. Brothers, Judge.

[File endorsement omitted]

[fol. 90]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

[Title omitted]

ANSWER TO COMPLAINT—Filed July 22, 1964

Now comes defendant National Bellas Hess, Incorporated, by its attorneys, Leibman, Williams, Bennett and Baird, appearing herein pursuant to the Court's Order of May 20, 1964 and without waiver of or prejudice to defendant's right to persist in and maintain its objection to the Court's jurisdiction over its person, and, by way of answer to the complaint herein and without waiver of or prejudice to defendant's exception to the Court's Order of June 23, 1964, denying its motion to strike or dismiss complaint filed herein on June 19, 1964, alleges, as follows:

First Defense

1. The complaint fails to state a claim or a cause of action, upon which relief can be granted by this Court.

[fol. 91]

Second Defense

1. As to the allegations contained in paragraph (1) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that, from on or about August 1, 1955 to on or before the date of the filing of the complaint herein, *viz.*, on or before October 15, 1963, it was engaged, on a national basis, in business in the United States solely as a mail order vendor; admits that, during such period and in the course of such business, it issued, annually, two catalogues and also certain sales

books and flyers, which it disseminated, via the United States mails only, to its vendees and potential vendees; specifically denies that, during such period or any other period whatsoever or in the course of such business or in any other manner whatsoever, it was engaged in soliciting orders in the State of Illinois from users or anyone else whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

Further, by way of answer to paragraph (1) of the complaint, defendant alleges that:

(a) Defendant has been, at all times material herein, and still is a corporation, organized and existing under the laws of the State of Delaware;

[fol. 92] (b) Defendant's sole place of business has been, at all times material herein, and still is in the State of Missouri;

(c) Defendant has, at all times material herein, qualified and now is qualified to do business only in its state of incorporation, that is, the State of Delaware, and in the State of Missouri;

(d) Defendant has, at all times material herein, done and now is doing business only in the State of Missouri;

(e) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any office;.

(f) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidary or in any other manner whatsoever, any distribution house;

(g) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any sales house;

(h) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within [fol. 93] the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any warehouse;

(i) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any other place of business;

(j) Defendant has not, at any time material herein, had or maintained and now does not have or maintain any agent operating within the State of Illinois under defendant's authority or a subsidiary's authority or in any other manner whatsoever;

(k) Defendant has not, at any time material herein, had or maintained and now does not have or maintain any other representative operating within the State of Illinois under defendant's authority or a subsidiary's authority or in any other manner whatsoever;

(l) Insofar as the Illinois Use Tax Act is construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Illinois Use Tax Act violates and is repugnant to the Constitution of the United States, especially, Article I, Section 8, clause 3; Article I, Section 8, clause 7; Article I, Section 10, clause 1; Article I, Section 10, clause 3; and Amendment XIV, Section 1;

[fol. 94] (m) Insofar as the Illinois Use Tax Act is construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Illinois Use Tax Act violates and is repugnant to the Constitution of Illinois, especially, Article II, Section 2; Article II, Section 13; and Article II, Section 14;

(n) Insofar as plaintiff's Rules under the Illinois Use Tax Act are construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant,

such Rules violate and are repugnant to the Constitution of the United States, especially, Article I, Section 8, clause 3; Article I, Section 8, clause 7; Article I, Section 10, clause 1; Article I, Section 10, clause 3; and Amendment XIV, Section 1; and

(o) Insofar as plaintiff's Rules under the Illinois Use Tax Act are construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Rules violate and are repugnant to the Constitution of Illinois, especially, Article II, Section 2; Article II, Section 13; and Article II, Section 14.

2. As to the allegations contained in paragraph (2) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not [fol. 95] require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes, which Act is entitled "An Act in relation to a tax upon the privilege of using tangible personal property in this State", or any other provision of such Act has been, at any time material herein, or now is applicable to defendant; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation to pay to plaintiff or any other agency of the State of Illinois, at any rate whatsoever or in any amount whatsoever, any tax provided or specified in such Illinois Use Tax Act or in any other statute whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

(3) As to the allegations contained in pafagraph (3) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that it has been, at all times material herein, and still is a corporation organized and existing under the laws of the State

of Delaware; admits that its sole place of business has been, at all times material herein, and still is in the State of Missouri; specifically denies that it has had, at any time [fol. 96] material herein, or now has any place of business whatsoever in the State of Illinois; specifically denies that the Department of Revenue of the State of Illinois or any other agency of such State has issued, at any time material herein, or now is issuing to defendant, pursuant to applicable provisions of the Illinois Use Tax Act or any other statute whatsoever, a certificate of Registration, number 953 777, or any other certificate whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

(4) As to the allegations contained in paragraph (4) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that it was, at all times material herein, and still is engaged, on a national basis, in business in the United States solely as a mail order vendor; admits that, during such times, it issued, annually, and still issues, annually, two catalogues and also certain sales books and flyers, which it disseminated and still disseminates, via the United States mails only, to its vendees and potential vendees; specifically denies that, during such times or any other time whatsoever or in the course of such business or in any other manner whatsoever, it was or now is engaged in soliciting orders in the State of Illinois from users or anyone else [fol. 97] whatsoever; specifically denies that Section 3 of the Illinois Use Tax Act or any other provision of such Act has been, at any time material herein, or now is applicable to defendant; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation, under Section 3 of the Illinois Use Tax Act or any other provision of such Act, under any other statute whatsoever, or for any other reason whatsoever, to file a

return with plaintiff or any other agency of the State of Illinois in the form or substance described in paragraph (4) of the complaint or in any other form or substance whatsoever; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation, under Section 3 of the Illinois Use Tax Act or any other provision of such Act, under any other statute whatsoever, or for any other reason whatsoever, to pay to plaintiff or any other agency of the State of Illinois any tax provided or specified in such Illinois Use Tax Act or in any other statute whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

5. As to the allegations contained in paragraph (5) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically [fol. 98] denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Notice of Proposed Assessment, to which reference is made in paragraph (5) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such purported Notice of Proposed Assessment is predicated on the best judgment and information or any other adequate judgment and information of plaintiff or any other agency of the State of Illinois; admits that, for the period designated in such purported Notice of Proposed Assessment, *viz.*, from July 17, 1961 through October 31, 1962, defendant filed no return under

such Illinois Use Tax Act with plaintiff or any other agency of the State of Illinois; admits that, on or about January 21, 1963, plaintiff sent, via United States registered mail, to defendant, and defendant received, via such mail, from plaintiff, a purported copy of such purported Notice of Proposed Assessment; alleges that defendant does not have sufficient knowledge or information to form a belief regarding the allegation that, on January 21, 1963, [fol. 99] plaintiff delivered to the Secretary of State of the State of Illinois, and such Secretary of State received from plaintiff, a purported copy of such purported Notice of Proposed Assessment and, accordingly, denies such allegation; specifically denies that defendant has been, at any time material herein, or now is a taxpayer of the State of Illinois pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that the Secretary of State of the State of Illinois or anyone else in such State has been, at any time material herein, or now is defendant's agent pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such Secretary of State or anyone else in such State has been, at any time material herein, or now is defendant's agent for service of notices and legal process or for any other purpose whatsoever; specifically denies that, on or about January 21, 1963 or any other date whatsoever, defendant owed and was delinquent in paying to the State of Illinois, for the period designated in such purported Notice of Proposed Assessment or any other period whatsoever, the sum of $74,593.75 or any other sum whatsoever for use tax or any other reason whatsoever; specifically denies that, on January 21, 1963 or any other date whatsoever, defendant owed and was subject to paying to the State of Illinois, for the period designated in such purported Notice of Proposed Assessment or any other period [fol. 100] whatsoever, the sum of $18,648.43 or any other sum whatsoever for penalty for use tax or any other reason whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

6. As to the allegations contained in paragraph (6) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act and plaintiff's purported Rules thereunder have been, at any time material herein, or now are applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Notice of Proposed Assessment, to which reference is made in paragraph (6) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; admits that defendant has not, at any time material herein, responded, by way of protest and by way of request for hearing to plaintiff, to such purported Notice of Proposed Assessment; [fol. 101] specifically denies that plaintiff has made, at any time material herein and in accordance with such Illinois Use Tax Act or any other statute whatsoever, a Final Assessment of tax and penalties owed by defendant to plaintiff in the sum of $93,242.18 or any other sum whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

7. As to the allegations contained in paragraph (7) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois

has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Final Assessment, to which reference is made in paragraph (7) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such purported Final Assessment is predicated on the best judg- [fol. 102] ment and information or any other adequate judgment and information of plaintiff or any other agency of the State of Illinois; admits that, on or about June 26, 1963, plaintiff sent, via United States registered mail, to defendant, and defendant received, via such mail, from plaintiff, a purported copy of such purported Final Assessment; alleges that defendant does not have sufficient knowledge or information to form a belief regarding the allegation that, on June 26, 1963, plaintiff delivered to the Secretary of State of the State of Illinois, and such Secretary of State received from plaintiff, a purported copy of such purported Final Assessment and, accordingly, denies such allegation; specifically denies that defendant has been, at any time material herein, or now is a taxpayer of the State of Illinois pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that the Secretary of State of the State of Illinois or anyone else in such State has been, at any time material herein, or now is defendant's agent pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such Secretary of State or anyone else in such State has been, at any time material herein, or now is defendant's agent for service of notices and legal process or for any other purpose whatsoever; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed and was delinquent in paying to the State of

[fol. 103] Illinois, for the period designated in such purported Final Assessment or any other period whatsoever, the sum of $74,593.75 or any other sum whatsoever for use tax or any other reason whatsoever; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed and was subject to paying to the State of Illinois, for the period designated in such purported Final Assessment or any other period whatsoever, the sum of $18,648.43 or any other sum whatsoever for penalty for use tax or any other reason whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

8. As to the allegations contained in paragraph (8) of the complaint, defendant alleges that they are vague and ambiguous and are argumentative and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed to plaintiff, on account of the purported Final Assessment, to which [fol. 104] reference is made in paragraph (7) of the complaint and which, unmarked, is attached to the complaint, or for any other reason whatsoever, the sum of $93,242.18 or any other sum whatsoever; admits that defendant has not paid to plaintiff any part of the sum of $93,242.18 set forth in such purported Final Assessment; specifically denies that defendant has owed, at any time material herein, or now owes to plaintiff the sum of $93,242.18 or any other sum whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

9. Defendant denies, generally and specifically, each and every material allegation of fact contained in the complaint not hereinbefore admitted, qualified, or denied.

Wherefore, defendant prays the Court for entry of judgment herein dismissing plaintiff's complaint, with prejudice; and awarding costs to defendant.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 105] Verification (omitted in printed).

[fol. 106] Certificate of Service (omitted in printing).

[fol. 111]

IN THE CIRCUIT COURT OF COOK COUNTY

[Title omitted]

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT, ETC.—Filed December 15, 1964

Now come Harry L. Hulman, Successor Director of Revenue of the Department of Revenue of the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, and moves this Court to enter a Summary Judgment or in alternative Judgment on the pleadings in favor of plaintiff in the above entitled cause, and to request an order to postpone all depositions in this cause, until the further order of Court, and in support of this motion the said plaintiff files an affidavit herewith attached to and made a part hereof.

William G. Clark, Attorney General, of the State of Illinois, Attorney for defendants.

[fol. 112]

AFFIDAVIT IN SUPPORT OF MOTION

State of Illinois,
County of Cook, ss.:

Harry L. Hulman, Director of Revenue of the Department of Revenue in the State of Illinois, being first duly sworn upon oath, deposes and says that he is the Director of Revenue of the Department of Revenue of the State of Illinois, and duly authorized to execute this Affidavit and that he has knowledge of the facts in this cause and that he has read the Affidavit and Answer of the defendants herein, and knows and understands the contents thereof;

Affiant, in support of said motion for summary judgment states:

(1) the answer fails to state any legal defenses, in law, in equity, or otherwise;

(2) that from the answer filed herein by the defendant and the admissions as to the receipt of the proposed assessment and the final assessment by the defendant, and its failure to assert the remedies available under the Retailers' Occupation Tax Act, the Use Tax Act, and the Administrative Review Act, that there is no genuine issue raised by the Answer as to any material fact;

(3) that it affirmatively appears on the face of defendant's Answer that the decision of Department of Revenue versus Downstate Coal Company, 11 Illinois 2nd 317, 1957, is controlling: The following language is pertinent in support of plaintiff's motion herein:

> [fol. 113] "when a taxpayer raises questions as to the period of time covered by assessments for the first time in answer to suit by the Department of Revenue for collection of the retailers' occupation tax, any question of law or fact concerning an assessment is raised too

late, since such matters could have been raised by administrative review. If the assessment was not proper or regular, the taxpayer should have, within the time provided, protested the assessment, and the Department of Revenue would have set a hearing on the matter. If the taxpayer is not satisfied, there is provision for judicial review of the determination. Department of Finance v. Sinclair, 382 Ill.118".

Harry L. Hulman, Deponent.

Subscribed and sworn to before me this 14th day of December A. D. 1964.

Mildred Harris, Notary Public, my commission expires: 8-21-65.

[fol. 115]

IN THE CIRCUIT COURT OF COOK COUNTY

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed January 25, 1965

State of Illinois,
County of Cook, ss.:

William G. Clark, being first duly sworn on his oath deposes and says that he is the Attorney General of the State of Illinois and that he is the duly authorized agent in this behalf for the Department of Revenue of the State of Illinois, the plaintiff herein and that he has full knowledge of the facts in this cause and that he has read the Answer of the defendant herein, and knows and understands the contents thereof.

Affiant, in support of said motion for summary judgment states as follows:

(1) the answer fails to state any legal defenses, in law, in equity, or otherwise;

(2) that from the answer filed herein by the defendant and the admissions as to the receipt of the proposed assessment and the final assessment by the defendant, and its failure to assert the remedies available under the Retailers' [fol. 116] Occupation Tax Act, the Use Tax Act, and the Administrative Review Act, that there is no genuine issue raised by the Answer as to any material fact;

(3) that it affirmatively appears on the face of defendant's Answer that the decision of Department of Revenue versus Downstate Coal Company, 11 Illinois 2nd 317, 1957, is controlling: The following language is pertinent in support of plaintiff's motion herein:

> "when a taxpayer raises questions as to the period of time covered by assessments for the first time in answer to suit by the Department of Revenue for collection of the retailers' occupation tax, any question of law or fact concerning an assessment is raised too late, since such matters could have been raised by administrative review. If the assessment was not proper or regular, the taxpayer should have, within the time provided, protested the assessment, and the Department of Revenue would have set a hearing on the matter. If the taxpayer is not satisfied, there is provision for judicial review of the determination. Department of Finance v. Sinclair, 382 Ill.118".

Wherefore affiant prays that judgment be entered herein for the plaintiff and against the defendant, and costs.

William G. Clark, Deponent.

Subscribed and sworn to before me this 22nd day of January A.D. 1965.

(Illegible), Notary Public, my commission expires:

[fol. 186]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

AFFIDAVIT OF MERITS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—Filed March 2, 1965

State of New York,
County of New York, ss.:

George Marks, being first duly sworn, upon oath deposes and says, that he is an officer, to wit, a Vice-President, and duly authorized agent of National Bellas Hess, Inc., defendant herein, and has knowledge of the contents of this affidavit; that affiant is authorized to make this affidavit, and that affiant, if sworn as a witness, can testify competently to the facts herein set forth. Affiant, in opposition to plaintiff's motion for summary judgment, states as follows:

1. Defendant National Bellas Hess, Inc. is a corporation, organized under the laws of the State of Delaware, and duly qualified to do business in the State of Missouri.

2. That it has a good defense on the merits to all of plaintiff's claims herein.

3. That the nature of defendant's defense follows:

4. As already noted, National Bellas Hess, Inc. is a Delaware corporation. It is duly qualified to do business, does business, and its sole place for the doing of business is within the State of Missouri.

5. National Bellas Hess, Inc. is a national mail order [fol. 187] company which issues a number of catalogs during the year. There are issued annually two main catalogs ("Spring & Summer"; and "Fall & Winter") and a number of intermediate smaller "sales books", or "flyers". Catalogs, sales books and flyers are disseminated to customers and

potential customers solely and entirely through the use of the United States mails.

They are mailed only, always, from North Kansas City, Missouri, and none from any point in Illinois. They are not shipped by truck or otherwise to any other mailing point, as some companies do.

6. National Bellas Hess, Inc. has not qualified or registered to do business in Illinois; nor, in fact, in any state other than Delaware and Missouri.

7. It has no registered agent in Illinois, and has not authorized any person to act as its agent, either to receive process, or accept service, or apply for, receive or accept any licenses or permits, in Illinois.

8. The company's only plants are located in North Kansas City, and all its mail order activities are carried on there, except for purchasing, which is done in the first instance by a wholly owned New York subsidiary, in New York City; and no activities, of this or any nature, are carried on in Illinois.

9. The company's catalogs present a wide variety of merchandise, at retail. A main catalog contains approximately 4000 different items, and is mailed to the company's own list of customers, maintained by it in Kansas City, and not in Illinois. This list was originally acquired from a predecessor company in 1932, and then consisted of about 5,000,000 names. As time goes on, and customers fail to order, their names are weeded out. As new customers are secured, their names are added. A "Catalog" (using this designation for one of the two main books, to distinguish [fol. 188] it from all other smaller books, hereafter referred to as "flyers") is too costly to distribute casually, or carelessly. It is usually sent only to active, recent customers, who have ordered a minimum amount of merchandise within a specified time, and is mailed to customers by name, from their stencils, though of course a request for a catalog from

a new name will be complied with. Flyers are also mailed thus, but to a less restricted list. They may also occasionally be mailed in bulk, or addressed to "occupant" (here the local postmaster delivers as indicated) or, as is more usual, enclosed in the parcels sent to customers in filling orders from a prior flyer or catalog. In any case, it will be noted, the mails are employed; and the mailing is from the only location where the company has warehouses and assembly and distribution points, to wit—North Kansas City, Missouri; and not from or in Illinois.

10. Thus the only warehouses the company maintains from which sales to customers including Illinois residents are filled are all located in North Kansas City. Goods are shipped by the cheapest available method of transportation, which in most cases is mail, but occasionally it could be railway express for a bulky item or for one which is too large for the receiving post office to handle. If a customer should specify any particular method of shipment, it would be followed if possible. However no goods are shipped by other than common carrier.

11. The company itself has no trucks delivering in Illinois, or anywhere else, for that matter.

12. Orders from customers are received only in its office, plant and warehouse in North Kansas City, Missouri and in no other location, and all normal correspondence in connection with such orders with customers, the review and acceptance of such orders are made from one of its warehouses and plants in Kansas City.

[fol. 189] 13. The company does not maintain, keep or use, nor has it ever in the past maintained, kept or used, permanently or temporarily, directly or indirectly, or through any agent, any office, branch, distribution depot, sales or sample room, warehouse or storage place in Illinois.

14. The defendant does not have nor has it ever had any employees, representative, agent, salesman, independ-

ent contractor, canvasser or solicitor operating in the State of Illinois for the purpose of soliciting, selling or taking orders for tangible personal property, or delivering the same, or accepting payments or servicing any of the products it sold.

15. It owns no tangible property in the State of Illinois whether realty or personalty.

16. It owns no motor vehicles in the State of Illinois, nor does it hold any licenses for motor vehicles in the State of Illinois.

17. It does not prepare or supply any advertising displays for use in Illinois and does not advertise its products for sale in newspapers, billboards, radio or TV within the State of Illinois.

18. It has brought no suits in the State of Illinois.

19. Payment for merchandise bought by residents of Illinois is made either by cash or check sent by the customer to National Bellas Hess, Inc., at North Kansas City, Missouri, when the order is mailed, or when on C.O.D. orders payment is made to the postal employee when the merchandise is delivered; if merchandise is ordered on credit the merchandise is paid for by cash or check mailed by the customer to North Kansas City, Missouri, in one sum or in installments in accordance with the provisions of the purchase agreement. Payment for merchandise purchased by Illinois residents by mail order is never made to National Bellas Hess, Inc., in Illinois nor to any agent, em- [fol. 190] ployees, salesman, or representative of any kind of National Bellas Hess, Inc., in Illinois.

20. In summary, and additionally:—National Bellas Hess, Inc. has never—

a. Qualified to do business in Illinois or appointed any agent for the service of process on National Bellas Hess, Inc., in Illinois.

b. Maintained, either by ownership or rental of property, or otherwise, a place of business in Illinois.

c. Maintained, occupied or used in Illinois any office, branch, place of distribution, sales or sample rooms or places for sale, warehousing or storage of goods.

d. Owned any trucks or vehicles in Illinois, or applied for licenses therefor.

e. Had any officers, agents, employees, salesmen, servicemen or organization, or "independent contractors" performing services for it in Illinois.

f. Had any tangible property, real or personal, in Illinois.

g. Solicited or promoted sales or received purchases, or orders through agents or salesmen or any other person, whether or not an agent or employee of National Bellas Hess, Inc., in Illinois.

h. Advertised its merchandise for sale in any newspaper or periodical published in Illinois.

i. Repossessed by legal proceedings any merchandise sold to customers in Illinois.

j. Instituted an action in any court in Illinois.

k. Delivered merchandise personally to residents of Illinois or by truck of its own ownership or other private carrier.

l. Had any telephone listing in Illinois.

[fol. 191] 21. The receipt of mail orders from Illinois residents as described above constitutes the only activity of any kind conducted by the company in or with respect to the State of Illinois or its residents. Affiant alleges that the company is neither a taxpayer nor a collector of use taxes within the meaning and scope of the Illinois Use Tax Law.

Wherefore, affiant says that defendant National Bellas Hess, Inc. is entitled to defend the said action and prays that plaintiff's motion for summary judgment shall be dismissed by the Court.

George Marks, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 29th day of January, A.D. 1965.

Rose Crystal, Notary Public, State of New York, No. 24-587110, Certified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1966.

[fol. 192]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

AFFIDAVIT OF MERITS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Missouri,
County of Clay, ss.:

William O. Campbell, being first duly sworn, upon oath deposes and says, that he is an officer, to wit, a Vice-President, and duly authorized agent of National Bellas Hess, Inc., defendant herein, and has knowledge of the contents of this affidavit; that affiant is authorized to make this affidavit, and that affiant, if sworn as a witness, can testify competently to the facts herein set forth. Affiant, in opposition to plaintiff's motion of summary judgment, states as follows:

1. Defendant National Bellas Hess, Inc. is a corporation, organized under the laws of the State of Delaware, and duly qualified to do business in the State of Missouri.

2. That it has a good defense on the merits to all of plaintiff's claims herein.

3. The nature of defendant's defense is fully set forth in the affidavit of George Marks, sworn to the 29th day of January, 1965, which affidavit your affiant has read. Your affiant herewith corroborates the said affidavit and the facts therein set forth, avers that it is true, and that if sworn as a witness affiant can testify competently to the facts herein and therein set forth.

[fol. 193] Wherefore, affiant says the defendant National Bellas Hess, Inc. is entitled to defend the said action and prays that plaintiff's motion for summary judgment shall be dismissed by the Court.

William O. Campbell, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 1st day of February, A.D. 1965.

Teresa Handley, Notary Public.

My Commission Expires: April 30, 1967.

[fol. 196]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

At Law

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, Defendant.

ORDER AND JUDGMENT—March 10, 1965

This cause having come on to be heard on plaintiff's motion for summary judgment; on defendant's motion to strike plaintiff's affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to section 57(5), Illinois Civil Practice Act; and on defendant's renewed oral motion for issuance of subpoenas for and the testimony herein of Harry L. Hulman, Director of Revenue, State of Illinois; of William G. Clark, Attorney General, State of Illinois; and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and the parties having appeared by their respective at-
[fol. 197] torneys herein, and the Court having been fully advised in the premises,

It Hereby Is Ordered that:

(1) Defendant's renewed oral Motion of March 8, 1965 herein for issuance of subpoenas for and the taking herein of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois; of William G. Clark, Attorney General,

State of Illinois; and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, be, and the same hereby is, denied;

(2) Defendant's Motion to Strike Plaintiff's Affidavits in Support of Plaintiff's Motions for Summary Judgment or, in the alternative, to Deny Plaintiff's Motion for Summary Judgment and for the Imposition of Expenses on Plaintiff pursuant to Section 57(5), Illinois Civil Practice Act, served on February 18, 1965 and filed herein on February 23, 1965, be, and the same hereby is, denied;

(3) Plaintiff's Motion for Summary Judgment, served on December 11, 1964 and filed herein, by leave of the Court first had and obtained, on January 27, 1965, be, and the same hereby is, granted;

(4) Judgment be, and the same hereby is, granted, for plaintiff and against defendant, in the sum prayed in the [fol. 198] Complaint herein, sworn by Harry L. Hulman, Director of Revenue, State of Illinois, on October 11, 1963 and filed herein on October 15, 1963, that is, the sum of $93,242.18, representing taxes of $74,593.75, assessed, under the Illinois Use Tax Act, by plaintiff against defendant for the period of July 17, 1961 through October 31, 1962, plus penalties of $18,648.43 thereon;

Enter: William V. Brothers, Judge.

Leibman, Williams, Bennett and Baird, Attorneys for Defendant, 208 South La Salle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 199]

APPEAL TO THE SUPREME COURT OF ILLINOIS FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

[Title omitted]

NOTICE OF APPEAL—Filed April 7, 1965

To: William G. Clark, Esq., Attorney General, State of Illinois, Attorney for Plaintiff, 160 North LaSalle Street, Chicago 1, Illinois.

Please Take Notice that defendant in the above-entitled cause, National Bellas Hess, Incorporated, appearing in the cause pursuant to the Order of May 20, 1964 of the Circuit Court of Cook County therein and without waiver of or prejudice to defendant's right to persist in and maintain its objection to the jurisdiction of the Circuit Court or any other Illinois court over its person, appeals to the Supreme Court of Illinois, pursuant to the applicable provisions of the Constitution of Illinois, as amended, of the Illinois Re-
[fol. 200] vised Statutes, as amended, and of the Illinois Supreme Court Rules, as amended, from each and every-one of the following Orders and Judgments entered by the Circuit Court in the cause:

1.) Order of May 20, 1964, denying the motion of National Bellas Hess, Incorporated to set aside and quash service of alias summons, and each and every part of such Order;

2.) Order of June 23, 1964, denying the motion of defendant National Bellas Hess, Incorporated to strike or dismiss complaint, and each and every part of such Order;

3.) Order of December 15, 1964, granting plaintiff's motion for stay of any and all depositions, including defendant's deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to required written notice, to commence on

December 17, 1964, until further order of the Circuit Court, and each and every part thereof;

4.) Order of January 27, 1965, granting plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, and each and every part thereof, except the third paragraph of the Order;

[fol. 201] 5.) Order of February 5, 1965, granting plaintiff's motion for leave to file motion for summary judgment and affidavit, and each and every part thereof, except paragraphs 5 and 6 of the Order;

6.) Order of February 5, 1965, granting plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964 and January 22, 1965, and to file a new affidavit of said Harry L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment, and each and every part thereof, except paragraphs 2 and 3 of the Order;

7.) Order of February 16, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, and each and every part thereof;

8.) Order of March 2, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, instanter, and each and every part thereof;

9.) Order of March 10, 1965, denying defendant's motion to strike and dismiss verified complaint; granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, [fol. 202] 1965, instanter; and denying defendant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice

M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and each and every part thereof; and

10.) Order and judgment of March 10, 1965, denying defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; denying defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; granting plaintiff's motion for summary judgment; and entering judgment, for plaintiff and against defendant, in the sum of $93,242.18, and each and every part thereof.

[fol. 203] Defendant prays for the following judgments, decrees, orders, or proceedings, by way of relief, from the Supreme Court of Illinois:

1.) A judgment and order that the purported service of alias summons and the purported alias summons in this cause, jointly and severally, are void and of no effect whatsoever and should be quashed by the Circuit Court of Cook County, because such purported service was not made in accordance with applicable Illinois statutes and the process of such Circuit Court can not and does not extend, pursuant to pertinent Illinois statutes, to defendant in the attendant circumstances;

2.) A judgment and order that the purported service of alias summons and the purported alias summons in this cause, jointly and severally, are void and of no effect whatsoever and should be quashed by the Circuit Court of Cook County, because, if such pertinent Illinois statutes are construed to apply to defendant in the attendant circumstances, such statutes, jointly and severally, are unconstitutional, pursuant to the applicable provisions of the

Constitution of Illinois, as amended, and of the Constitution of the United States, and of no force and effect whatsoever, insofar as defendant is concerned;

[fol. 204] 3.) A judgment and order that the Circuit Court of Cook County has not, at any time material in this cause, had and now does not have jurisdiction over defendant's person and remanding the cause to such Circuit Court, with directions to vacate and set aside, *in toto*, its Order of May 20, 1964, denying defendant's motion to set aside and quash service of alias summons; to enter an order in the cause granting defendant's motion, on special appearance, to set aside and quash service of alias summons, or, alternatively, to set aside and quash alias summons, and dismiss complaint; and to enter an order in the cause setting aside and quashing alias summons and dismissing the complaint, with prejudice and with costs to defendant, because, pursuant to the applicable Illinois statutes, as amended, the Constitution of Illinois, as amended, and the Constitution of the United States, the purported service of process on defendant and the purported process directed to defendant are void and of no force and effect whatsoever and such Circuit Court never acquired and now does not have any jurisdiction over defendant's person;

4.) A judgment and order that the Complaint in this cause fails to state a claim or cause of action against defendant, upon which relief can be granted by the Circuit Court of Cook County or any other court, because such Complaint [fol. 205] fails to allege, in accordance with the applicable Illinois statutes and, especially, the Illinois Civil Practice Act, sufficient material allegations of ultimate fact to state a cause of action, in law or in equity, against defendant and because, even if it is construed to contain sufficient well-pleaded allegations of ultimate fact, such Complaint fails to state a cause of action against defendant pursuant to the pertinent Illinois statutes and the applicable provisions of the Constitution of Illinois, as amended, and of the Constitution of the United States;

5.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order of June 23, 1964, denying defendant's motion to strike or dismiss complaint; to enter an order in the cause granting defendant's motion to strike or dismiss complaint; and to enter an order in the cause striking and dismissing the complaint, with prejudice and with costs to defendant, because such complaint fails to plead, in accordance with the applicable Illinois statutes and, especially, the Illinois Civil Practice Act, sufficient material allegations of ultimate fact to state a cause of action, in law or in equity, against defendant and because, even if [fol. 206] it is construed to contain sufficient well-pleaded allegations of ultimate fact, such complaint fails to state a cause of action against defendant pursuant to the pertinent Illinois statutes and the applicable provisions of the Constitution of Illinois, as amended, and of the Constitution of the United States;

6.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of December 15, 1964, insofar as it grants plaintiff's motion for stay of any and all depositions, including defendant's deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to required written notice, to commence on December 14, 1964, until further order of such Circuit Court, and to enter an order in the cause allowing defendant, forthwith, to take the deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to defendant's written notice of deposition of November 30, 1964, to commence on December 17, 1964, and also to take such other and further depositions and to make such other and further discovery in the cause within the pertinent provisions of the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and of the applicable Illinois [fol. 207] Supreme Court Rules, because such order of the

Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

7.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of January 27, 1965, insofar as it grants plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, and to enter an order in the cause denying plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

8.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of February 5, 1965, insofar as it grants plaintiff's motion for leave to file motion for summary judgment and affidavit, and to enter an order in the [fol. 208] cause denying plaintiff's motion for leave to file motion for summary judgment and affidavit in support thereof, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

9.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of February 5, 1965, insofar as it grants plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964 and January 22, 1965, and to file a new affidavit of said Harry

L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment and to enter an order in the cause denying plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964, and January 22, 1965, and to file a new affidavit of said Harry L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and [fol. 209] contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

10.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto,* its Order of February 16, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, and to enter an order in the cause denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act and the pertinent Illinois Supreme Court Rules;

11.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto,* its Order of March 2, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, instanter, and to enter an order in the cause denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of [fol. 210] Revenue, State of Illinois, instanter or otherwise, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such

Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

12.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order of March 10, 1965, denying defendant's motion to strike and dismiss verified complaint; granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, 1965, instanter; and denying defendant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and to enter an order in the cause granting defendant's motion to strike and dismiss verified complaint; denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, 1965, instanter or otherwise; and granting defen- [fol. 211] dant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, because such Order of the Circuit Court is contrary to the pleadings and the evidence in the cause, is arbitrary, capricious, and an abuse of such Circuit Court's discretion, and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules; and

13.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order and Judgment of March 10, 1965, denying defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the

testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; denying defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to [fol. 212] deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; granting plaintiff's motion for summary judgment; and entering judgment, for plaintiff and against defendant, in the sum of $93,242.18, and to enter an order in the cause granting defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; granting defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; denying plaintiff's motion for summary judgment; and dismissing the complaint with prejudice and with costs to defendant, because such Order and Judgment of the Circuit Court is contrary to the pleadings and the evidence in the cause, is arbitrary, capricious, and an abuse of such Circuit Court's discretion, and contra- [fol. 213] venes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

Dated, April 7, 1965

[fol. 428]

IN THE SUPREME COURT OF ILLINOIS

Docket No. 39330—Agenda 24—November, 1965.

THE DEPARTMENT OF REVENUE, Appellee,

v.

NATIONAL BELLAS HESS, INC., Appellant.

OPINION—January 25, 1966

Mr. Justice House delivered the opinion of the court:

Defendant National Bellas Hess, Incorporated, a non-resident mail-order vendor, appeals from a summary judgment entered by the circuit court of Cook County against it for the sum of $93,242.18, representing taxes of $74,593.75 assessed under the Illinois Use Tax Act, (Ill. Rev. Stat. 1961, chap. 120, pars. 439.1 *et seq.*,) for the period of July 17, 1961, through October 31, 1962, plus a 25% penalty of $18,648.43. Constitutional questions, as well as the public revenue, are involved.

There is no dispute about the following facts which are gathered from the pleadings. Defendant is a national mail order company. It issues annually two main catalogues, described as "Spring and Summer" and "Fall and Winter," and it also issues during the year a number of intermediate smaller "sales books" or "flyers." The catalogue contains approximately 4000 different items of merchandise for retail sale, and it is mailed to the company's own list of customers. This list, which contained 5,000,000 names when the company acquired it in 1932, is kept current with active and recent customers. The "flyers," which are less costly to distribute, are mailed to a less restricted list of customers or potential customers. They are occasionally mailed in bulk addressed to "occupant" or enclosed in the parcels sent

to customers in filling orders from a prior "flyer" or catalogue.

The company's only plant is located in North Kansas City, Missouri, and all of its mail-order activities occur there, except for purchasing, which is done initially by a wholly owned subsidiary in New York. All of the catalogues and "flyers" are mailed from North Kansas City; orders from customers are received and accepted there; the goods are mailed or shipped by common carrier from there; and payment by the customer is mailed there.

The company is a Delaware corporation and is qualified to do business only in Delaware and Missouri. It does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible prop- [fol. 429] erty, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

Section 3 of the Use Tax Act, which became effective in July, 1955, imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." It also provides that the tax "* * * shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *." (Ill. Rev. Stat. 1961, chap. 120, par. 439.3.) The constitutionality of the act was adjudicated and a determination of its operating incidence was made by this court two years later. (*Turner* v. *Wright*, 11 Ill.2d 161.) Section 2 of the act, which defines various terms used in the act, was amended effective July 17, 1961, (the commencement date of the assessment here in question) by adding a new paragraph to the definition of a "retailer maintaining a place of business in this State." The new paragraph, referred to

as the "catalogue amendment", defines a "retailer maintaining a place of business in this State" as any retailer "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stat. 1963, chap. 120, par. 439.2.

The Use Tax Act was also amended in July, 1961, by adding a new section, section 12a, which provides for substituted service of process on a nonresident falling within the definition of "retailer maintaining a place of business in this State." It provides that, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in the State within the meaning of Section 2 of this Act, * * * shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address." [fol. 430] (Ill. Rev. Stat. 1961, chap. 120, par. 439.12a.) The section provides that this substituted service of process or notice "shall be of the same force and validity as if served upon the taxpayer personally within this State."

While defendant has raised a number of grounds for reversing the judgment entered against it, its two principle arguments are: (1) that the exercise of *in personam* jurisdiction by the circuit court in this proceeding constitutes a denial of due process of law under the Federal and Illinois constitutions, (U.S. Const., Amend. XIV, sec. 1; Ill. Const. art. II, sec. 2,) and (2) that the Use Tax Act in so far as it requires that defendant collect the use tax from Illinois tax-

payers is a denial of due process of law under the Federal and Illinois constitutions and violative of the commerce clause of the Federal constitution. (U.S. Const., art. I, sec. 8, cl. 3.) We consider first the constitutionality of requiring defendant to collect the Illinois use tax.

The Supreme Court has held that a State's power to impose upon a nonresident vendor the burden of collecting its use tax depends upon the amount of activities conducted by the nonresident vendor in the taxing state. (*American Oil Company* v. *Neill*, 380 U.S. 451, 14 L. ed. 2d 1, 85 S. Ct. 1130; *Scripto Inc.* v. *Carson*, 362 U.S. 207, 4 L. ed. 2d 660, 80 S. Ct. 619; *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L. ed. 744, 74 S. Ct. 535; *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L. ed. 1309, 64 S. Ct. 1028.) "There must be * * * 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Scripto Inc.* v. *Carson*, 362 U.S. 207, 210-211, 4 L. ed. 2d 660, 80 S. Ct. 619, 621.

Nelson v. *Sears Roebuck & Co.*, 312 U.S. 359, 85 L. ed. 888, 61 S. Ct. 586, involved the constitutionality of the Iowa use tax as applied to Sears mail order business conducted directly between customers in Iowa and Sears mail-order houses located outside Iowa. Sears was authorized to do business in Iowa and had retail stores there. The court upheld Iowa's power to impose this collector's liability against Sears on such mail orders against the attack that the exercise of such power denied Sears of due process of law under the fourteenth amendment and violated the commerce clause of section 8 of article I of the constitution.

Nelson v. *Montgomery Ward*, 312 U.S. 373, 85 L. ed. 897, 61 S. Ct. 593, a companion case to *Sears Roebuck*, raised the identical issue on almost the same facts as in [fol. 431] *Sears Roebuck* and the court reached the same result. In the course of this opinion, however, the court stated: "There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the

retail stores of the petitioner [Montgomery Ward & Co.] in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' *This stipulation clearly means that respondent has solicited mail order sales in Iowa.* [Emphasis added.] The fact that that solicitation was done through local advertisements rather than directly by local agents * * * is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state." 312 U.S. 373, 376, 85 L. ed. 897, 899, 61 S. Ct. 593, 595.

The same issue was again raised in *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L. ed. 1309, 64 S. Ct. 1028. That case also involved the Iowa use tax, but this time the vendor had never qualified to do business as a foreign corporation in Iowa nor did it maintain any office, branch or warehouse there. Orders were solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. Again, the court upheld Iowa's jurisdiction to impose liability on the nonresident vendor for collection of the use tax on property shipped by common carrier or the post into Iowa.

The question was again raised in *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L. ed. 744, 74 S. Ct. 535. Miller Bros. Co. only made sales directly to its customers in Wilmington, Delaware, and did not take orders by mail or telephone. Maryland's Court of Appeals held Miller Bros. Co. liable for the Maryland use tax on all goods sold in the Delaware store to Maryland residents whether the goods were delivered into Maryland by common carrier, the vendor's truck or carried by the purchasers themselves. The U.S. Supreme Court held that advertising by Miller Bros. Co. with Delaware newspapers and radio stations which reached Maryland residents, its occasional sales circulars which were mailed to all former customers including customers in Maryland, and the occasional delivery of goods into Maryland did not constitute a jurisdictional basis for imposing the burden of collecting or paying the Maryland

use tax on this Delaware vendor. In distinguishing the *General Trading* case the court said, "That was the case of an [fol. 432] out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers * * *. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." 347 U.S. 340, 346-347, 98 L. ed. 744, 749, 74 S. Ct. 535, 540.

The issue again came before the court in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 4 L. ed. 2d 660, 80 S. Ct. 619. The court held that solicitation by advertising specialty brokers who were not employees or agents of Scripto, the Georgia vendor, constituted a jurisdictional basis for imposing the burden of collecting or paying the Florida use tax on orders solicited by the brokers and filled by shipping the merchandise into Florida. After stating that the case was controlled by *General Trading Co.* the court distinguished the *Miller Bros. Co.* case by saying: "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. * * * Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." 362 U.S. 207, 212, 4 L. ed. 2d 660, 664, 665, 80 S. Ct. 619.

From the foregoing cases it would appear that Mr. Justice Rutledge has gotten to the heart of the "what" and "why" that constitutes a jurisdictional basis for imposing on a nonresident vendor the burden of collecting the use tax on merchandise sold and delivered to residents of the

taxing State. He said: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading Co.* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant [fol. 433] constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer." (Separate opinion concurring with *General Trading Company* v. *State Tax Commission* and *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340, 349, 88 L. ed. 1313, 1319, and dissenting to *McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327, 349, 354, 88 L. ed. 1304, 1319, 1321.) In short, "continuous local solicitation followed by delivery of ordered goods to the customers" apparently forms a constitutional basis for a "State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant." *Miller Bros. Co.* v. *State of Maryland,* 347 U.S. 340, 346, 98 L. ed. 744, 749, 74 S. Ct. 535, 540.

We do not think it important that defendant in this case solicits orders by catalogue and flyers rather than by local advertising as in *Montgomery Ward,* or by salesmen as in *General Trading Co.* or by brokers as in *Scripto, Inc.* The important question is whether there is "exploitation of the consumer market" by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues since the vendor will use that type of solicitation which most effectively and economically exploits the consumer market.

We believe the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogues and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Defendant argues that the issue here is whether Illinois can impose its use tax on it and that this "issue cannot be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection." Section 3 of the Use Tax Act provides that the tax imposed on the purchaser-user is to be collected by the retailer. Section 8 provides that "the tax [fol. 434] herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State * * *." The effect of these two sections is that the tax is to be collected by the retailer; but if he fails to collect the tax, he himself is liable for its payment. The Florida statute under consideration in the *Scripto, Inc.,* case also imposed on the vendor the burden of collecting or paying the use tax. The court stated, "We note that the appellant is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer," and went on to affirm the tax liability levied against Scripto, Inc., 362 U.S. at 211.

Defendant's other principal contention for reversing this judgment is that the exercise of *in personam* jurisdiction by the circuit court deprived it of due process of law. Defendant states that in none of the cases dealing with a State use tax and the imposition of collection liability has the issue been raised of whether substituted service of process on a nonresident vendor will give a court jurisdiction to enter an *in personam* judgment.

Thomas Reed Powell raised this issue in "Sales and Use Taxes: Collection from Absentee Vendors." (57 Harv. L. Rev. 1086 (1944).) He analyzed the problem of obtaining personal service on a nonresident vendor who does all his business by mail order or whose soliciting agents have left the State ahead of the process server and concluded that, "Such practical difficulties cannot as yet be minimized by applying to all foreign corporations engaged exclusively in interstate commerce the familiar statutes requiring the appointment of an agent or providing that the doing of business shall itself be a sufficient basis for service of process on a state official in causes of action arising out of business there done." (57 Harv. L. Rev. 1086, 1088.) This conclusion was apparently correct when written, but we note that it was written a year before the land mark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. ed 95, 66 S. Ct. 154.

In *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, we stated, "Under modern doctrine the power of a State court to enter a binding judgment against one not served with process within the State depends upon two questions: first, whether he has certain minimum contacts with the State [citation], and second, whether there has been a reasonable method of notification." (22 Ill.2d 432, 437). We consider first the question of minimum con-
[fol. 435] tacts with the State.

In the use tax cases heretofore considered the court speaks of the State's "jurisdiction or power to create this collector's liability," (See, *e.g.*, *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 344, 98 L. ed. 744, 748, 74 S. Ct. 535, 538,) and turns the question of such jurisdiction or power on whether the nonresident vendor has "minimum connections" with the taxing State. (*Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 345, 98 L. ed. 744, 748, 74 S. Ct. 535, 539.) Thus, the power to render an *in personam* judgment against one not served with process within the State and the power to impose a collector's liability for the use tax on a nonresident vendor both depend on "mini-

mum contacts" or "minimum connections" with the State. Whether the "minimum connections" which form the basis of jurisdiction to impose the collector's liability are sufficient to form the basis of *in personam* jurisdiction to enforce this liability has not, to our knowledge, been decided by the Supreme Court. It would be an anomalous situation, however, if a State had jurisdiction to impose this collector's liability but did not have jurisdiction to enforce it.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 2 L. ed. 2d 223, 78 S. Ct. 199, involved an action brought in California against a foreign insurance company on a policy issued to a resident of California. The insurance company did not have any office or agent in California and never solicited or did any insurance business in California apart from the policy involved in the case. The insurance company was not served with process in California, but was notified by registered mail at its place of business in Texas, pursuant to a statute permitting such service in actions on insurance contracts. After referring to the *International Shoe* case and the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations," the court held that "it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with California. 355 U.S. 220, 223, 2 L. ed. 2d 223, 226, 78 S. Ct. 199, 201.

Hanson v. *Denckla*, 357 U.S. 235, 2 L. ed. 2d 1283, 78 S. Ct. 1228, concerned the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. Delaware refused to accord full faith and credit to a Florida decree adjudicating the matter because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. [fol. 436] The trustee was not served with process in Florida, but was notified by ordinary mail and notice was published locally as required by the Florida statutes dealing with constructive service.

The court first noted that "the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. ed. 565 to the flexible standard of *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 90 L. ed. 2d 95, 66 S. Ct. 154." It then stated, "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * a defendant may not be called upon to do so [defend himself in a foreign tribunal] unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." The court proceeded to distinguish the "minimal contacts" present in the *McGee* case from the absence of "minimal contacts" in this *Hanson* case. "None of the trust assets has ever been held or administered in Florida, and the record discloses *no solicitation of business in that State either in person or by mail.* * * * In *McGee*, the nonresident defendant *solicited* a reinsurance agreement with a resident of California. * * * But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the [trust] agreement as the *solicitation* in *McGee.*" (Emphasis added.) 357 U.S. 234, 251-252, 2 L. ed. 2d 1283, 1296, 78 S. Ct. 1228, 1238-1239.

Thus, solicitation which is of prime importance in satisfying the "minimal connections" requirement in the use tax cases is of equal importance in satisfying the "minimal contacts" requirement necessary for the exercise of *in personam* jurisdiction with substituted service of process. Also significant is the fact that the solicitation, which was so important in the *McGee* case, was by mail. (See also, *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 94 L. ed. 1154, 70 S. Ct. 927.) We hold that defendant's continuous local solicitation for mail orders followed by delivery of the ordered goods to customers in Illinois constitute the "minimal contacts" between defendant and Illinois that are requisite to the exercise of *in personam* jurisdiction over it.

This brings us to the question of whether section 12a provides a reasonable method of notification. The section states that a true and certified copy of the process or notice shall be sent to the taxpayer by registered or certified mail at his last known address. In the *International Shoe Co.* [fol. 437] case the court said, "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit." (326 U.S. 310, 320, 90 L. ed. 95, 104, 66 S. Ct. 154, 160.) We are of the opinion that section 12a gives the person to be served or notified "a realistic opportunity to appear and be heard." See *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 436.

The record shows that on January 21, 1963, a certified copy of the notice of proposed assessment was sent by registered mail addressed to defendant's North Kansas City office. On June 26, 1963, a certified copy of final assessment was sent by registered mail addressed to defendant's North Kansas City office and on January 23, 1964, a certified copy of *alias* summons, with a copy of the complaint attached, was sent by registered mail to defendant's North Kansas City office. Defendant did not respond to the notice of proposed assessment or final assessment, but it did make a special appearance to contest the jurisdiction of the circuit court. There is nothing in the record to show that defendant did not have adequate notice or sufficient time to prepare its defenses and appear.

Defendant also argues that section 12a does not apply to it. To support this argument it first points out that the section states, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State * * *." Defendant then contends that it receives no privilege from Illinois.

The plain intent and meaning of section 12a is to provide a method of substituted service on a nonresident "acting as a retailer maintaining a place of business in this State within the meaning of Section 2." Whether Illinois extended the

"privilege" or defendant accepted the "privilege" is academic, because, as we have pointed out, defendant is "maintaining a place of business in this State within the meaning of Section 2" and the application of 12a to defendant did not deprive it of due process of law.

Also in support of its argument that section 12a is not applicable to it, defendant points out that the section provides for mailing a copy of the notice or process "to the taxpayer * * * addressed to such taxpayer at his last known address." Since defendant is a collector of the tax rather than a "taxpayer" it concludes that the section does not apply to it.

[fol. 438] As we just pointed out, section 12a provides a method of substituted service on persons who have incurred a liability under the Use Tax Act. The section clearly provides in the first sentence that it is to apply to (1) nonresident vendors, (2) resident vendors who subsequently move from the State or conceal their whereabouts and (3) resident or nonresident users who move from the State or conceal their whereabouts. The section thereafter uses the word "taxpayer" in a generic, and not in a technical, manner to cover all three categories of persons who may have incurred liability under the act and cannot be served with process in the State. The section clearly applies to defendant.

The constitutional issues argued by *amici curiae* are essentially the same as those argued by defendant. They do contend, however, that equal treatment has not been accorded resident and nonresident vendors with regard to their respective liabilities under the Retailers' Occupation Tax Act and the Use Tax Act on credit sales. Since there is nothing in the record concerning credit sales, we need not consider this question. Nor will we consider a memorandum of the Department of Revenue concerning sales for resale and its effect on manufacturers and wholesalers, since there are no sales for resale involved in this case.

The remaining questions raised by defendant can be disposed of summarily. Defendant argues that the complaint

should have been dismissed because the verification was not personally signed by Harry L. Hulman, Director of the Department of Revenue. Verification of the complaint was not necessary. (Ill. Rev. Stat. 1961, chap. 110, par. 35.) It also argues that the trial court erred in entering a summary judgment because there were genuine issues of material fact raised by the pleadings. Defendant does not state what those issues are and our examination of the pleadings does not reveal any such issues. It is also argued that summary judgment should not have been entered because two affidavits of Director Hulman were not personally signed by him and the affidavit of Attorney General William G. Clark consists only of argument and conclusions of law. As we just mentioned, the pleadings do not show any genuine issues of material fact.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

[fol. 439]

IN THE SUPREME COURT OF ILLINOIS

No. 39330

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,

vs.

NATIONAL BELLAS HESS, INCORPORATED, Appellant.

Appeal from Circuit Court, Cook County

63 C 21015

ORDER OF AFFIRMANCE—January 25, 1966

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 29th day of March, 1966.

Mrs. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

(SEAL)

[fol. 456]

IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 22, 1966

I. Notice hereby is given that National Bellas Hess, Incorporated, the defendant-appellant above named, hereby appeals to the Supreme Court of the United States from the final Order and Judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of Cook County, Illinois, which is set forth and contained in the Opinion of the Supreme Court of Illinois filed in this cause on January 25, 1966; in the Order of the Supreme Court of Illinois denying defendant-appellant's petition for rehearing filed in this cause on March 23, 1966; and the final process of Mandate issued by the Supreme Court of Illinois in this cause on March 29, 1966.

[fol. 457] This appeal is taken pursuant to the United States Code, Title 28, Section 1257(2).

II. The Clerk will please prepare a transcript of the Record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

1.) Complaint, filed in the Circuit Court of Cook County, Illinois on October 15, 1963, together with attached Verification, subscribed and sworn on October 11, 1963, and attached unnumbered Exhibits.

2.) Order, entered by the Circuit Court of Cook County, Illinois on December 13, 1963.

3.) Alias Summons, issued by the Circuit Court of Cook County, Illinois on January 8, 1964, together with attached Affidavit of Service, dated January 23, 1964, and attached Return of Service, filed in the Circuit Court of Cook County, Illinois on February 4, 1964.

4.) Order, entered by the Circuit Court of Cook County, Illinois on January 10, 1964.

5.) Unnumbered Exhibits to Complaint, filed in the Circuit Court of Cook County, Illinois on January 10, 1964.

6.) Notice and Special Appearance and Motion to Vacate and Set Aside Order Entered January 10, 1964, filed in the [fol. 458] Circuit Court of Cook County, Illinois on January 29, 1964.

7.) Order, entered by the Circuit Court of Cook County, Illinois on January 31, 1964.

8.) Notice and Special Appearance and Motion to Set Aside and Quash Service of Alias Summons, or, Alternatively, to Set Aside and Quash Alias Summons, and Dismiss Complaint, together with attached Affidavits, filed in the Circuit Court of Cook County, Illinois on March 24, 1964.

9.) Transcript of Proceedings of May 6, 1964 in the Circuit Court of Cook County, Illinois.

10.) Order, entered by the Circuit Court of Cook County, Illinois on May 20, 1964.

11.) Appearance, filed in the Circuit Court of Cook County, Illinois on June 19, 1964.

12.) Notice and Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, filed in the Circuit Court of Cook County, Illinois on June 23, 1964.

13.) Order, entered by the Circuit Court of Cook County, Illinois on June 23, 1964.

14.) Answer to Complaint, filed in the Circuit Court of Cook County, Illinois on July 22, 1964.

[fol. 459] 15.) Notice of Motion, filed in the Circuit Court of Cook County, Illinois on September 14, 1964.

16.) Order, entered by the Circuit Court of Cook County, Illinois on September 21, 1964.

17.) Notice of Deposition, served on November 30, 1964 and filed in the Circuit Court of Cook County, Illinois on February 9, 1965.

18.) Notice of Motion and Motion, together with attached Affidavit, filed in the Circuit Court of Cook County, Illinois on December 15, 1964.

19.) Order, entered by the Circuit Court of Cook County, Illinois on December 15, 1964.

20.) Transcript of Proceedings of January 25, 1965 in the Circuit Court of Cook County, Illinois.

21.) Affidavit, filed in the Circuit Court of Cook County, Illinois on January 25, 1965.

22.) Order, entered by the Circuit Court of Cook County, Illinois on January 27, 1965.

23.) Transcript of Proceedings of February 5, 1965 in the Circuit Court of Cook County, Illinois.

[fol. 460] 24.) Order, entered by the Circuit Court of Cook County, Illinois on February 5, 1965 (#1).

25.) Order, entered by the Circuit Court of Cook County, Illinois on February 5, 1965 (#2).

26.) Transcript of Proceedings of February 16, 1965 in the Circuit Court of Cook County, Illinois.

27.) Order, entered by the Circuit Court of Cook County, Illinois on February 16, 1965.

28.) Affidavit, filed in the Circuit Court of Cook County, Illinois on February 16, 1965.

29.) Notice of Motion and Defendant's Motion to Strike Plaintiff's Affidavits in Support of Plaintiff's Motion for Summary Judgment or, in the Alternative, to Deny Plaintiff's Motion for Summary Judgment and for the Imposition of Expenses on Plaintiff Pursuant to Section 57(5), Illinois Civil Practice Act, filed in the Circuit Court of Cook County, Illinois on February 23, 1965.

30.) Notice of Motion and Defendant's Motion to Strike and Dismiss Alleged Verified Complaint, filed in the Circuit Court of Cook County on March 2, 1965.

31.) Notice of Motion and Motion, together with attached Affidavit and attached Unnumbered Exhibits, filed in the Circuit Court of Cook County, Illinois on March 2, 1965.

[fol. 461] 32.) Transcript of Proceedings of March 2, 1965 in the Circuit Court of Cook County, Illinois.

33.) Order, entered by the Circuit Court of Cook County, Illinois on March 2, 1965.

34.) Affidavits of Merits, filed in the Circuit Court of Cook County, Illinois on March 2, 1965.

35.) Transcript of Proceedings of March 10, 1965 in the Circuit Court of Cook County, Illinois.

36.) Order, entered by the Circuit Court of Cook County, Illinois on March 10, 1965.

37.) Order and Judgment, entered by the Circuit Court of Cook County, Illinois on March 10, 1965.

38.) Notice of Appeal, filed in the Circuit Court of Cook County, Illinois on April 7, 1965.

39.) Opinion, filed by the Supreme Court of Illinois on January 25, 1966.

40.) Notice of Motion and Defendant-Appellant's Motion for Extension of Time to File Petition for Rehearing, together with attached Affidavit, filed in the Supreme Court of Illinois on February 9, 1965.

41.) Order, entered by the Supreme Court of Illinois on February 9, 1966.

[fol. 462] 42.) Petition for Rehearing, filed in the Supreme Court of Illinois on February 14, 1966.

43.) Order, entered by the Supreme Court of Illinois on March 23, 1966.

44.) Mandate, issued by the Supreme Court of Illinois on March 29, 1966.

45.) This Notice of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Illinois.

III. The following questions are presented by this appeal:

1.) Whether the provisions of the Illinois Use Tax Act, as amended (Illinois Revised Statutes [1965], Chapter 120, Sections 439.1 *et seq.*) and the provisions of the Illinois Retailers' Occupation Tax Act, as amended (Illinois Revised Statutes [1965], Chapter 120, Sections 440 *et seq.*) designated in such Use Tax Act, which impose liability upon sellers for collection and payment of Illinois use taxes payable by users, whether or not such use taxes have been collected or are collectible by such sellers, are unconstitutional, insofar as they are construed to be applicable and are applied to defendant-appellant, a non-resident seller which has no place of business, no property, no agents, no inde- [fol. 463] pendent contractors, and no other representatives in Illinois and whose only contact with Illinois arises from engaging in interstate commerce by use of the United States mails for sending mail order catalogues into the several States and by shipping, in response to interstate orders, goods to Illinois users from out of Illinois via the United States mails or interstate common carrier, because:

(A) The imposition of such liability under the Illinois Use Tax Act on such non-resident seller imposes an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States;

(B) The imposition of such liability under the Illinois Use Tax Act on such non-resident seller deprives such seller of its property without due process of law in violation of Amendment XIV, Section 1, of the Constitution of the United States; and

(C) The exercise of *in personam* jurisdiction by Illinois over such non-resident seller, by means of out-of-state service of process via the United States mail, in order to impose such liability under the Illinois Use Tax Act on such [fol. 464] seller, deprives such seller of its property without due process of law in violation of Amendment XIV, Section 1, of the Constitution of the United States.

Leibman, Williams, Bennett and Baird, By: Julian R. Wilheim, Attorneys for Defendant-Appellant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago, Illinois 60604, FInancial 6-2200.

Dated: April 21, 1966

[fol. 465] Certificate of Service (omitted in printing).

[fol. 467] Clerk's Certificate (omitted in printing).

[fol. 468]

SUPREME COURT OF THE UNITED STATES

No. 241—October Term, 1966

NATIONAL BELLAS HESS, INCORPORATED, Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ETC.

Appeal from the Supreme Court of the State of Illinois.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 16 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1129 311

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Blanchard Press, Inc., Boston, Mass. — Law Printers

BLANK

PAGE

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	3
Statement	5
1. The Illinois Use Tax	5
2. Appellant's Business	6
3. Proceedings Below	7
The Question Is Substantial	8
Conclusion	18
Appendix A	19
Appendix B	34
Appendix C	36

Citations

Cases

American Oil Co. v. *Neill*, 380 U.S. 451	2, 10
Connecticut General Co. v. *Johnson*, 303 U.S. 77	2
General Trading Co. v. *Tax Comm'n*, 322 U.S. 335	12, 13
McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327	10
Miller Bros. Co. v. *Maryland*, 347 U.S. 340	2, 9, 10, 11, 12, 13
Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373	11, 13
Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359	11, 13
Norton Co. v. *Department of Revenue*, 340 U.S. 534	10
Scripto, Inc. v. *Carson*, 362 U.S. 207	2, 12, 13
State v. *Innkeepers Supply Co.*, 277 Ala. 476, 172 So. 2d 40	14
State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So. 2d 91 (1965)	9, 13, 14

Constitution and Statutes

	Page
Constitution of the United States:	
Article I, Section 8 (Commerce Clause)	2
Fourteenth Amendment (Due Process Clause)	2, 7
Illinois Use Tax Act (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*	1, 5
Section 2	3
Section 3	3
Section 12a	3, 5, 7
Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*	2
Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts 1966	17
New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966	17
Rhode Island sales and use tax act, ch. 18 and 19 of Tit. 44 of the General Laws of Rhode Island 1956, as amended by H.B. 1730, Laws 1966	17
Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950, ch. 151, Laws 1966	17

Miscellaneous

Kust and Sale, State Taxation of Interstate Sales, 46 Va. L. Rev. 1290	13
Note, 59 Mich. L. Rev. 441	13
Report of Subcommittee on State Taxation of House Judiciary Committee, H. Rept. 565, 89th Cong., 1st Sess.	9, 13, 15, 16, 17
U. S. Bureau of the Census, Dept. of Commerce 1963 Census of Business, Retail Trade, U. S. Summary, Table 1, p. 3 (Advance Report)	17

In the

Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL BELLAS HESS, INCORPORATED,

APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,

APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of Illinois (App. A, pp. 19-33 below) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against appellant to collect taxes alleged to be due from appellant under the Illinois Use Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120, §§ 439.1 *et seq.)* and pertinent provisions of the Illinois

Retailers' Occupation Tax Act, as amended (Hl. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966. A petition for rehearing was denied on March 23, 1966 and the mandate was issued March 29, 1966. (App. B, pp. 34-35 below.) The notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966.

Jurisdiction is conferred on this Court to review the judgment by 28 U.S.C. 1257(2) and 2101(c). The following cases sustain the jurisdiction of this Court: *Connecticut General Co.* v. *Johnson*, 303 U.S. 77; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340; *Scripto, Inc.* v. *Carson*, 362 U.S. 207; *American Oil Co.* v. *Neill*, 380 U.S. 451.

Question Presented

Whether it violates the commerce clause and the Fourteenth Amendment for a State to make an out-of-State mail order house, with no property, offices, warehouses, agents or other representatives within the jurisdiction, liable for the collection and payment of a tax levied upon its customers' local use of goods where its only contact with the State is (a) addressing catalogs to local residents through the United States mail and (b) sending merchandise to local customers by mail or common carrier.[1]

[1] The notice of appeal correctly indicates that the issue here discussed as a single question is analytically divisible into three parts: (1) the constitutionality of requiring the appellant to collect the tax under the Fourteenth Amendment; (2) the constitutionality of the same requirement under the commerce clause; and (3) the constitutionality of entering a judgment imposing liability *in personam* for the amount of the tax upon an out-of-State seller served only by leaving a copy of the summons with the Secretary of State and by mail. We reserve the right to break the analysis into its component parts in any argument on the merits. However, regardless of the details of the analysis, there is essentially only one question and we discuss it here as a unit.

Statutes Involved

The Illinois Use Tax Act, section 2, as amended by the Act of July 17, 1961 (Ill. Rev. Stats. [1963], ch. 120, § 439.2) provides in critical part—

> "Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:
>
> 1. ....
>
> 2. Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Section 3 (Ill. Rev. Stats. [1963], ch. 120, § 439.3) provides in pertinent part:

> The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State . . . and remitted to the Department. . . .

Section 12a (Ill. Rev. Stats. [1963], ch. 120, § 439.12a) provides:

> *Appointment of secretary of state for service of process—Force and effect of service.* Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under

this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit.

Related sections of the Illinois Use Tax Act are reprinted in Appendix C, pp. 36-44 below.

Statement

1. *The Illinois Use Tax*

Since 1955 Illinois has levied a use tax upon the privilege of using in Illinois "tangible personal property purchased at retail . . . from a retailer." Ill. Rev. Stat. [1963], ch. 120, § 439.1 *et seq.* The statute provides that the use tax shall be collected from the purchaser by any retailer "maintaining a place of business in this State," and makes the obligation a debt of the retailer regardless of whether the tax is actually collected *(Ibid.)*

The term "retailer maintaining a place of business within this State" was originally given a conventional meaning requiring some local establishment such as an office, distribution house, sales house or warehouse. On July 17, 1961 Illinois expanded the term "maintaining a place of business' artificially to include (Ill. Rev. Stat. [1963], ch. 120, par. 439.2)—

> Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Illinois also added to the Use Tax Act a new Section 12a providing that any non-resident "who accepts the privilege . . . of acting as a retailer maintaining a place of business in this State" shall be deemed to appoint the Secretary of State his agent for the service of process in any proceeding under the Act. Service was to be made by delivering a copy to the Secretary of State and mailing a copy to the taxpayer. Ill. Rev. Stat. [1963], ch. 120, par. 439.12a.

2. *Appellant's Business*

The new, artificial definition brought appellant within the reach of the statute, if constitutional. Appellant is a national mail order concern incorporated in Delaware, whose only offices and warehouse are located in Missouri (R. 91, 95, 186, 187).[2] Twice a year appellant mails catalogs from Missouri to a list of over five million customers resident throughout the United States (R. 186-187). It also mails out and encloses in merchandise smaller intermediate sales books and flyers (R. 188). All orders are received and accepted in Missouri (R. 188-189). All goods are shipped from outside Illinois either by mail or common carrier (R. 188-189).

Appellant has no other contact with Illinois. It is qualified to do business only in Delaware and Missouri. It has never registered with the Illinois Department of Revenue under the Use Tax Act. As noted by the court below, it "does *not* maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does *not* have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells; it does *not* own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has *not* advertised its merchandise for sale in newspapers, on billboards or by radio or television in Illinois" (App. A, p. 20 below, emphasis added).

On January 21, 1963 appellee issued a proposed assessment in the sum of $74,593.75 for "delinquent" Use Taxes for the period July 17, 1961 through October 31, 1962, plus a 25 percent penalty of $18,648.43, for a total of $93,242.18. The period of the assessment thus began the day of the

[2] The reference "R." followed by a number is to the original record certified from the Supreme Court of Illinois, as paginated for this Court.

enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment. Defendant declined to pay (R. 3, 6, 104).

3. *Proceedings Below*

This action was thereupon instituted by appellee in the Circuit Court of Cook County on October 15, 1963 to recover from appellant the use taxes assessed as above (R. 1-10). Service was made by leaving a copy of the summons and complaint with the Illinois Secretary of State and mailing a copy to appellant in Missouri in accordance with the 1961 amendment to Section 12a of the Illinois Use Tax Act (R. 33-34).

By special appearance appellant challenged, under the Fourteenth Amendment, the power of the circuit court to render an *in personam* judgment on the basis of such substituted service and notice by mail to a defendant whose only contact with Illinois was sending catalogs, advertising flyers and merchandise into the State from outside the jurisdiction (R. 43, 44, 50, 51). Although the motion to quash the process was denied, appellant preserved its objection to the jurisdiction throughout the proceedings in the Illinois courts (App. A, pp. 21, 22, 27, 31 below).

By its motion to strike or dismiss the complaint (R. 67, 75, 77, 82, 83, 86, 87) and again by its answer (R. 93, 94), appellant raised the constitutional contention that the Use Tax Act, insofar as it makes appellant liable for the use tax upon Illinois purchasers, is: (i) a denial of due process of law under the Fourteenth Amendment because appellant has not sufficient minimum relation to Illinois to furnish jurisdiction to regulate or tax; and (ii) violative of the commerce clause because requiring appellant to collect the tax imposes an undue burden upon interstate commerce.

The circuit court entered summary judgment on motion of appellee (R. 196-197), and appellant appealed (R. 199 *et seq.*).

The Supreme Court of Illinois considered and specifically rejected appellant's three claims under the United States Constitution. It put its decision squarely upon the ground that (App. A, p. 26 below)—

> the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogs and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders [by such catalogs and advertising] followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

The Question Is Substantial

This appeal squarely presents the question whether a State may constitutionally require an out-of-State business to collect and pay the taxes levied on its residents' subsequent use of the goods where the out-of-State business has only two points of contact with the jurisdiction: (1) it regularly mails catalogs and flyers soliciting mail orders into the State as part of a nation-wide distribution and (2) it ships goods which it has sold into the State by mail or common carrier. The Supreme Court of Illinois rested jurisdiction to tax solely upon those two facts. Its novel ruling goes beyond any decision of this Court sustaining

the imposition of liability upon out-of-State concerns, and is inconsistent in principle with *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340. The decision is squarely opposed to the only other ruling upon the question. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 So.2d 91 (1965). If allowed to stand, it is bound to proliferate changes in sales and use tax legislation and administrative practice in other States making thousands of mail order businesses, large and small, into collection agents for States and localities scattered all over the country with which they have not the least connection save that they deal with residents of the States by mail and common carrier through the channels of interstate commerce. The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee reported that the issue involved in this case—"whether a State may require a seller to collect its use tax where the only contacts with the State are the dissemination of advertising and the shipment of goods into the State by mail or common carrier"—is perhaps "the most important jurisdictional uncertainty at present," observing that "this question has not yet been decided by the United States Supreme Court" (H. Rept. 565, 89th Cong. 1st Sess., p. 627). The *Report*[3] also refers to "the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a series of local procedures and rules likely to be ill-designed for his business and at variance with the practice of other States where he is collecting tax" (*Id.* at 884). This appeal, therefore, presents a constitutional issue deserving plenary consideration.

1. The decisions of this Court under the due process

[3] We use the abbreviation "Report" to refer to the exhaustive study submitted by a Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee as H.Rept. 565, 89th Cong., 1st Sess. Part III, pp. 603-899, deals with sales and use taxes.

and commerce clauses have firmly established the doctrine that "when a tax is imposed on an out-of-State vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax" (*American Oil Co.* v. *Neill*, 380 U.S. 451, 458). There must be "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax" *(Ibid)*. The fact that the vendor knows that goods are destined for use within the taxing State is not enough to validate tax liabilities directly imposed upon or resulting from out-of-State sales which are otherwise insufficiently related to activities within the taxing State on the part of the vendor. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (sales tax).

Up to now the test has been whether the out-of-State concern is present or has property or representatives carrying on its business within the taxing State. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, illustrates the principle. There the Court held that an out-of-State vendor could not be required to collect the use tax levied by another State upon its own residents merely because the vendor's dissemination of advertising, including regular mailings four times a year, was addressed to prospective customers within the State and the vendor delivered goods there. In *Miller Bros.* the Maryland purchasers traveled from their residences to the Delaware store whereas here the Illinois residents send their orders by mail to the appellant's Missouri offices and warehouse. The difference between a mail order and personal travel can hardly be relevant, however, for in both cases the transaction is completed outside the State by use of the channels of interstate commerce. The volume of business was smaller in *Miller Bros.* than here, but nothing in the stipulation of

facts suggests that it was less regular. In *Miller Bros.* some of the goods were picked up by customers at the out-of-State store, but that was not true of the greater part—66 percent—of the business. The *Miller Bros.* decision, therefore, seems necessarily to hold that the regular solicitation of orders by the dissemination of general advertising, followed by delivery to local customers, is not sufficient to give a State jurisdiction to require the out-of-State vendor to collect a tax on the in-State customers' subsequent use of the goods. That holding is dispositive of the present case.

The mere solicitation of business from outside the State, followed by interstate delivery to local customers, however regular, has never been held a sufficient nexus. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, decided that a State may require an out-of-State seller to collect the use tax levied upon local mail order buyers where the seller also maintains local retail stores enjoying the protection and services of the government to the support of which it is asked to contribute by serving as a collection agency. The Court distinguished "out of State mail order houses" on the ground that they "are not receiving benefits from Iowa for which it has the power to exact a price" (312 U.S. at 364).[4] Later cases extended State power to situations in which the foreign corporation does only an interstate business, but none qualified the principle that jurisdiction to tax requires some presence—in person or

[4] Contrary to the suggestion of the court below the reference to local advertising of the mail order business found in the Montgomery Ward opinion (312 U.S. at 376) cannot fairly be read as an indication that advertising alone would give jurisdiction to require collection of a tax. Rather, it served to tie the mail order business to the retail stores and thus to justify the "burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business" (*Id.* at 375).

through property or representatives—within the State. In *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335, the imposition of liability to collect a local use tax was sustained where interstate sales were developed by a force of local salesmen operating out of headquarters in a neighboring state. *Scripto, Inc.* v. *Carson*, 362 U.S. 207 applied the *General Trading* doctrine to a dealer who had "ten wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods" (p. 211). The Court found no difference of constitutional significance in the contractual tagging of the salesmen as independent contractors rather than regular employees, nor in the circumstance that they also worked for others. It emphasized, however, the importance of their "local function of solicitation" saying that the "only incidence of this sales transaction that is non-local is the acceptance of orders" (*Ibid.*).[5]

Thus, even if *Miller Bros. Co.* v. *Maryland* is not conclusive in appellant's favor, no opinion of the Court has ever gone so far as to sanction a State law requiring an exclusively mail order business, located in another jurisdiction, to collect the use taxes on local residents. The commentators agree that the decisions dealing with solicitation by local sales representatives, whether agents or

[5] The Illinois Supreme Court relied upon the individual concurring opinion of Mr. Justice Rutledge in the *General Trading* case for the proposition that "regular continuous, persistent solicitation" of local customers should be a sufficient basis for the imposition of a tax (App. A, pp. 25-26 below). But there are many forms of solicitation and the expressions were used in a case dealing with local salesmen. The point at issue was whether continuous local solicitation through salesmen should have the same legal consequences as maintaining a local sales office. There is not the slightest reason to suppose that Justice Rutledge's references to "continuous local solicitation" meant the interstate mailing of catalogs, which was not involved in the *General Trading* case, rather than solicitation by a force of salesmen, traveling and working in Iowa, which was the case before the Court.

independent contractors leave open the status of out-of-State, exclusively mail order businesses. The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee reported (H. Rept. 565, 89th Cong., 1st Sess. 627 (1965)—

> Perhaps the most important jurisdictional uncertainty at present is whether a State may require a seller to collect its use tax where the only contacts with the State are the dissemination of advertising and the shipment of goods into the State by mail or common carrier. This question has not yet been resolved by the United States Supreme Court.

See also Kust and Sale, *State Taxation of Interstate Sales*, 46 Va. L. Rev. 1290, 1304 (1960); Note, 59 Mich. L. Rev. 441, 443 (1961).[5a]

2. The decision below is opposed to the only other State decision upon the question. In *State* v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So.2d 91 (1965) the Supreme Court of Alabama squarely held that Alabama could not require an out-of-State mail order business to collect use taxes merely because of the interstate dissemination of advertising and delivery of goods to local residents. The applicable statute required collection of the tax by a seller who—

[5a] The present case is also one of first impression in another respect—it is the first in which jurisdiction to issue a judgment *in personam* is squarely an issue in a use tax case involving constitutional questions. In both *Nelson* cases, Sears Roebuck and Montgomery Ward had each qualified to do business in the taxing State. In the *General Trading* case the company voluntarily entered a general appearance. In the *Scripto* case the company was plaintiff seeking an injunction to restrain a distraint on accounts receivable. The *Miller Bros.* case was an *in rem* proceeding. In the present case, for the first time, the question is presented whether it violates due process of law to enter an *in personam* judgment against a company which has never entered the State and done anything except an interstate mail order business.

distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State of Alabama.

The Court held the statute inapplicable chiefly because its application to an exclusively mail order business would be unconstitutional: "the tests repeatedly laid down in successive decisions of the Supreme Court of the United States" (277 Ala. at 388, 171 So. 2d at 94) do not permit the taxing State "to make such a use tax collector" out of "a foreign seller which sent catalogs exclusively by mail to Alabama residents, and which accepted and filled orders outside the State of Alabama exclusively by mail" (277 Ala. at 387, 171 So. 2d at 93).[6]

3. To make out-of-State mail order businesses into collectors of the use taxes owed by customers in numerous States would subject them to fundamentally unfair burdens obstructing interstate commerce. There are now forty-two States with sales and compensating use taxes, twenty-one of which already have provisions apparently making advertising a sufficient nexus.[7] If the decision below is not reversed, all twenty-one are likely to begin enforcement and other States can be expected to expand their legislation.

The practical burdens would be overwhelming. Mail order businesses advertise throughout the United States. Some are substantial concerns, but most are very small. "It must be borne in mind, therefore, that efforts to subject

---

[6] This decision was followed in *State* v. *Innkeepers Supply Co.*, 277 Ala. 476, 172 So.2d 40 (1965).

[7] On January 25, 1966, the date of the decision below, there were thirty-nine States with sales and use tax provisions, seventeen of which attempted to make advertising by catalog or otherwise a sufficient nexus. Since then, three more States have enacted sales and use taxes all with catalog advertising provisions, and one has amended her use tax to include a catalog provision. See p. 17 below.

mail order sales to taxation involve not only the few major houses but also a large number of much smaller businesses." *Report* 770. Acting as a tax collector for perhaps a score of States would entail a heavy burden for the large and an impossible burden for the small businesses. Separate records must be made and kept for each State. Taxes would have to be calculated at different rates according to the residence of the customer. There are wide variations in State laws, especially with respect to articles subject to and exempt from the tax. ". . . in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. Also, while the variety of rules as to taxation is unlikely to trouble a firm with a narrow range of items, sizable firms with broad lines may have to break down their order processing to enable clerks to specialize in groups of States." *Report* 771. Furthermore, while the local over-the-counter retailer can and does collect the tax, experience demonstrates that on mail-order sales a large percentage of the tax—ranging from 30 to 75 percent on the cash sales—can never be collected and therefore falls upon the vendors (*Ibid.*). These practical burdens could scarcely be borne if the statutes came to be enforced according to their terms following the decision of the Illinois courts. They have not been enforced only because the nexus treated as adequate below has generally been regarded as constitutionally insufficient. They are discriminatory against interstate commerce because no local business is required to serve as collection agent for more than one State.

It may be objected that since these burdens must be borne by out-of-State sellers who have local stores or local salesmen, it is no more unfair to require them to be borne by out-of-State mail order businesses. One can posit individual cases where the practical differences seem small.

Taking the two categories as groups, however, there are marked differences in the burden. Most businesses with a local sales force derive benefits from the local government to the support of which they are required to contribute. Their salesmen use the State's highways, enjoy its police protection, and carry on their business activities within the sphere of local concern substantially as if they were doing local rather than interstate business. Exclusively mail order businesses create no local problems and receive no local benefits. In addition, the concern with a local sales force has, by definition, a number of representatives within each State, who, if the management wishes, can deal with the problems of local taxation. Its situation is not necessarily different in this respect from the company which maintains a local office or outlet. The mail order house has no local representatives.

The rapid spread of sales and use taxes among county and municipal governments multiplies the disproportionate burdens which are put upon interstate commerce by the decision below. Twenty years ago only a handful of local governments imposed a sales tax; today, over 2,300 do so. Not only do the problems encountered with State use taxes recur at the level of local government where local taxes are permitted, but the burden of compliance would be many times the heavier because of the inaccessibility of tax information; because of the detailed paperwork involved in allocating mail order sales each to its proper county, city or town (sometimes even to its proper school or police district); and because of the sheer number of jurisdictions for which the work would have to be done. The situation has been tolerable only because it has been commonly assumed that the solicitation of orders by mail, followed by delivery in interstate commerce, is not a sufficient nexus to give jurisdiction to require collection and payment of the tax.[8]

[8] The above paragraph is based upon *Report*, ch. 27, p. 837 *et seq.*

The question presented has wide importance. According to the 1963 Census of Business there were 4,206 mail order establishments making almost $2,400,000,000 in sales.[9] The figures exclude specialty firms which solicit business by spot advertisements in national periodicals. The large mail order houses with nationwide retail outlets, while few in number, account for $1.1 billion in mail order sales. They pay the sales or use taxes. Where a firm does only a mail order business, however, collection or payment of sales taxes, including use taxes, is virtually unknown (except to the home State). *Report* 772. Nearly all of the 4,206 mail order businesses, therefore, and from a third to a half of the $2.4 billion volume is affected by the question. The present practice rests largely upon the view—correctly held, we believe—that to require collection of the tax in these circumstances is unconstitutional. The decision below, if unreviewed, would invite the forty-two sales and use tax States to change the present practice by administrative regulation or new legislation. The three States (Massachusetts,[10] Virginia[11] and New Jersey[12]) which have adopted sales and use taxes since the decision below have all included the catalog provision. One State, Rhode Island, has amended its statute since the decision below to insert a catalog provision.[13]

The net result would be an excessive burden upon interstate transactions and out-of-State businesses of a kind which the federal Constitution was designed to prohibit.

---

[9] U.S. Bureau of the Census, Dept. of Commerce, 1963 Census of Business, Retail Trade, U.S. Summary, Table 1, p. 3 (Advance Report).

[10] Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts, 1966.

[11] New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966.

[12] Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950 as amended by ch. 151, Laws 1966.

[13] Rhode Island sales and use tax act, ch. 18 and 19 of Title 44 of the General Laws of Rhode Island, 1956, as amended by H.B. 1730, Laws 1966.

Conclusion

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Appendix A

OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS

Docket No. 39330—Agenda 24—November, 1965.

THE DEPARTMENT OF REVENUE, APPELLEE, v. NATIONAL BELLAS HESS, INC., APPELLANT.

MR. JUSTICE HOUSE delivered the opinion of the court:

Defendant National Bellas Hess, Incorporated, a non-resident mail-order vendor, appeals from a summary judgment entered by the circuit court of Cook County against it for the sum of $93,242.18, representing taxes of $74,593.75 assessed under the Illinois Use Tax Act, (Ill. Rev. Stat. 1961, chap. 120, pars. 439.1 *et seq.*,) for the period of July 17, 1961, through October 31, 1962, plus a 25% penalty of $18,648.43. Constitutional questions, as well as the public revenue, are involved.

There is no dispute about the following facts which are gathered from the pleadings. Defendant is a national mail order company. It issues annually two main catalogues, described as "Spring and Summer" and "Fall and Winter," and it also issues during the year a number of intermediate smaller "sales books" or "flyers." The catalogue contains approximately 4000 different items of merchandise for retail sale, and it is mailed to the company's own list of customers. This list, which contained 5,000,000 names when the company acquired it in 1932, is kept current with active and recent customers. The "flyers," which are less costly to distribute, are mailed to a less restricted list of customers or potential customers. They are occasionally mailed in bulk addressed to "occupant" or enclosed in the parcels sent to customers in filling orders from a prior "flyer" or catalogue.

The company's only plant is located in North Kansas City, Missouri, and all of its mail-order activities occur there, except for purchasing, which is done initially by a wholly owned subsidiary in New York. All of the catalogues and "flyers" are mailed from North Kansas City; orders from customers are received and accepted there; the goods are mailed or shipped by common carrier from there; and payment by the customer is mailed there.

The company is a Delaware corporation and is qualified to do business only in Delaware and Missouri. It does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells, it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

Section 3 of the Use Tax Act, which became effective in July, 1955, imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." It also provides that the tax "* * * shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *." (Ill. Rev. Stat. 1961, chap. 120, par. 439.3.) The constitutionality of the act was adjudicated and a determination of its operating incidence was made by this court two years later. (*Turner* v. *Wright*, 11 Ill.2d 161.) Section 2 of the act, which defines various terms used in the act, was amended effective July 17, 1961, (the commencement date of the assessment here in question) by adding a new paragraph to the definition of a "retailer maintaining a place of business in this State." The new paragraph, referred

to as the "catalogue amendment", defines a "retailer maintaining a place of business in this State" as any retailer "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stat. 1963, chap. 120, par. 439.2.

The Use Tax Act was also amended in July 25, 1961, by adding a new section, section 12a, which provides for substituted service of process on a nonresident falling within the definition of "retailer maintaining a place of business in this State." It provides that "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in the State within the meaning of Section 2 of this Act,* * * shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address." (Ill. Rev. Stat. 1961, chap. 120, par. 439.12a.) The section provides that this substituted service of process or notice "shall be of the same force and validity as if served upon the taxpayer personally within this State."

While defendant has raised a number of grounds for reversing the judgment entered against it, its two principle arguments are: (1) that the exercise of *in personam* jurisdiction by the circuit court in this proceeding constitutes a denial of due process of law under the Federal and

Illinois constitutions, (U.S. Const., Amend. XIV, sec. 1; Ill. Const. art. II, sec. 2,) and (2) that the Use Tax Act insofar as it requires that defendant collect the use tax from Illinois taxpayers is a denial of due process of law under the Federal and Illinois constitutions and violative of the commerce clause of the Federal constitution. (U.S. Const., art. I, sec. 8, cl. 3.) We consider first the constitutionality of requiring defendant to collect the Illinois use tax.

The Supreme Court has held that a State's power to impose upon a nonresident vendor the burden of collecting its use tax depends upon the amount of activities conducted by the nonresident vendor in the taxing State. (*American Oil Company* v. *Neill*, 380 U.S. 451, 14. L.ed.2d 1, 85 S.Ct. 1130; *Scripto Inc.* v. *Carson*, 362 U.S. 207, 4 L.ed. 2d 660, 80 S.Ct. 619; *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L.ed. 744, 74 S.Ct. 535; *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L.ed. 1309, 64 S.Ct. 1028.) "There must be * * * 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Scripto Inc.* v. *Carson*, 362 U.S. 207, 210-211, 4 L.ed.2d 660, 80 S.Ct. 619, 621.

Nelson v. *Sears Roebuck & Co.*, 312 U.S. 359, 75 L.ed. 888, 61 S.Ct. 586, involved the constitutionality of the Iowa use tax as applied to Sears mail order business conducted directly between customers in Iowa and Sears mail-order houses located outside Iowa. Sears was authorized to do business in Iowa and had retail stores there. The court upheld Iowa's power to impose this collector's liability against Sears on such mail orders against the attack that the exercise of such power denied Sears of due process of law under the fourteenth amendment and violated the commerce clause of section 8 of Article I of the constitution.

Nelson v. *Montgomery Ward*, 312 U.S. 373, 85 L.ed. 897, 61 S.Ct. 593, a companion case to *Sears Roebuck*, raised

the identical issue on almost the same facts as in *Sears Roebuck* and the court reached the same result. In the course of this opinion, however, the court stated: "There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner [Montgomery Ward & Co.] in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' *This stipulation clearly means that respondent has solicited mail order sales in Iowa.* [Emphasis added.] The fact that that solicitation was done through local advertisements rather than directly by local agents * * * is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state." 312 U.S. 373, 376, 85 L.ed. 897, 899, 61 S.Ct. 593, 595.

The same issue was again raised in *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L.ed. 1309, 64 S.Ct. 1028. That case also involved the Iowa use tax, but this time the vendor had never qualified to do business as a foreign corporation in Iowa nor did it maintain any office, branch or warehouse there. Orders were solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. Again, the court upheld Iowa's jurisdiction to impose liability on the nonresident vendor for collection of the use tax on property shipped by common carrier or the post into Iowa.

The question was again raised in *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L.ed. 744, 74 S.Ct. 535. *Miller Bros. Co.* only made sales directly to its customers in Wilmington, Delaware, and did not take orders by mail or telephone. Maryland's Court of Appeals held Miller Bros. Co. liable for the Maryland use tax on all goods sold in the Delaware store to Maryland residents whether the

goods were delivered into Maryland by common carrier, the vendor's truck or carried by the purchasers themselves. The U. S. Supreme Court held that advertising by Miller Bros. Co. with Delaware newspapers and radio stations which reached Maryland residents, its occasional sales circulars which were mailed to all former customers including customers in Maryland, and the occasional delivery of goods into Maryland did not constitute a jurisdictional basis for imposing the burden of collecting or paying the Maryland use tax on this Delaware vendor. In distinguishing the *General Trading* case the court said, "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers *.* *. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." 347 U.S. 340, 346-347, 98 L.ed. 744, 749, 74 S.Ct. 535, 540.

The issue again came before the court in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619. The court held that solicitation by advertising specialty brokers who were not employees or agents of Scripto, the Georgia vendor, constituted a jurisdictional basis for imposing the burden of collecting or paying the Florida use tax on orders solicited by the brokers and filled by shipping the merchandise into Florida. After stating that the case was controlled by *General Trading Co.* the court distinguished the *Miller Bros. Co.* case by saying: "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when

personally present at Miller's store in Delaware. * * * Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." 362 U.S. 207, 212, 4 L.ed.2d 660, 664, 665, 80 S.Ct. 619.

From the foregoing cases it would appear that Mr. Justice Rutledge has gotten to the heart of the "what" and "why" that constitutes a jurisdictional basis for imposing on a nonresident vendor the burden of collecting the use tax on merchandise sold and delivered to residents of the taxing State. He said: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading Co.* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer." (Separate opinion concurring with *General Trading Company* v. *State Tax Commission* and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 349, 88 L.ed. 1313, 1319, and dissenting to *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 349, 354, 88 L.ed. 1304, 1319, 1321.) In short, "continuous local solicitation followed by delivery of ordered goods to the customers"

apparently forms a constitutional basis for a "State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant." *Miller Bros. Co. v. State of Maryland,* 347 U.S. 340, 346, 98 L.ed. 744, 749, 74 S.Ct. 535, 540.

We do not think it important that defendant in this case solicits orders by catalogue and flyers rather than by local advertising as in *Montgomery Ward,* or by salesmen as in *General Trading Co.* or by brokers as in *Scripto, Inc.* The important question is whether there is "exploitation of the consumer market" by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues since the vendor will use that type of solicitation which most effectively and economically exploits the consumer market.

We believe the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogues and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Defendant argues that the issue here is whether Illinois can impose its use tax on it and that this "issue cannot be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection." Section 3 of the Use Tax Act provides that the tax imposed on the purchaser-user is to be collected by the retailer. Section 8 provides that "the tax herein required to be collected by any retailer

pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State * * *." The effect of these two sections is that the tax is to be collected by the retailer; but if he fails to collect the tax, he himself is liable for its payment. The Florida statute under consideration in the *Scripto, Inc.*, case also imposed on the vendor the burden of collecting or paying the use tax. The court stated, "We note that the appellant is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer," and went on to affirm the tax liability levied against Scripto, Inc. 362 U.S. at 211.

Defendant's other principle contention for reversing this judgment is that the exercise of *in personam* jurisdiction by the circuit court deprived it of due process of law. Defendant states that in none of the cases dealing with a State use tax and the imposition of collection liability has the issue been raised of whether substituted service of process on a nonresident vendor will give a court jurisdiction to enter an *in personam* judgment.

Thomas Reed Powell raised this issue in "Sales and Use Taxes: Collection from Absentee Vendors." (57 Harv. L.Rev. 1086 (1944).) He analyzed the problem of obtaining personal service on a nonresident vendor who does all his business by mail order or whose soliciting agents have left the State ahead of the process server and concluded that, "Such practical difficulties cannot as yet be minimized by applying to all foreign corporations engaged exclusively in interstate commerce the familiar statutes requiring the appointment of an agent or providing that the doing of business shall itself be a sufficient basis for service of process on a state official in causes of action arising out of business there done." (57 Har.L.Rev. 1086, 1088.) This conclusion was apparently correct when written, but we note that it was written a year before the

landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.ed. 95, 66 S.Ct. 154.

In *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, we stated, "Under modern doctrine the power of a State court to enter a binding judgment against one not served with process within the State depends upon two questions: first, whether he has certain minimum contacts with the State [citation], and second, whether there has been a reasonable method of notification." (22 Ill.2d 432, 437). We consider first the question of minimum contacts with the State.

In the use tax cases heretofore considered the court speaks of the State's "jurisdiction or power to create this collector's liability." (See, e.g., *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 344, 98 L.ed. 744, 748, 74 S.Ct. 535, 538,) and turns the question of such jurisdiction or power on whether the nonresident vendor has "minimum connections" with the taxing State. (*Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 345, 98 L.ed. 744, 748, 74 S.Ct. 535, 539.) Thus, the power to render an *in personam* judgment against one not served with process within the State and the power to impose a collector's liability for the use tax on a nonresident vendor both depend on "minimum contacts" or "minimum connections" with the State. Whether the "minimum connections" which form the basis of jurisdiction to impose the collector's liability are sufficient to form the basis of *in personam* jurisdiction to enforce this liability has not, to our knowledge, been decided by the Supreme Court. It would be an anomolous situation, however, if a State had jurisdiction to impose this collector's liability but did not have jurisdiction to enforce it.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.ed.2d 223, 78 S.Ct. 199, involved an action brought in California against a foreign insurance company on a policy

issued to a resident of California. The insurance company did not have any office or agent in California and never solicited or did any insurance business in California apart from the policy involved in the case. The insurance company was not served with process in California, but was notified by registered mail at its place of business in Texas, pursuant to a statute permitting such service in actions on insurance contracts. After referring to the *International Shoe* case and the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations," the court held that "it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with California. 355 U.S. 220, 223, 2 L.ed.2d 223, 226, 78 S.Ct. 199, 201.

Hanson v. *Denckla*, 357 U.S. 235, 2 L.ed.2d 1283, 78 S.Ct. 1228, concerned the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. Delaware refused to accord full faith and credit to a Florida decree adjudicating the matter because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. The trustee was not served with process in Florida, but was notified by ordinary mail and notice was published locally as required by the Florida statutes dealing with constructive service.

The court first noted that "the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.ed. 565 to the flexible standard of *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 90 L.ed.2d 95, 66 S.Ct. 154." It then stated, "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * a defendant may not be called upon to do so [defend himself in a foreign tribunal] unless he has had the 'minimal contacts' with

that State that are a prerequisite to its exercise of power over him." The court proceeded to distinguish the "minimal contacts" present in the *McGee* case from the absence of "minimal contacts" in this *Hanson* case. "None of the trust assets has ever been held or administered in Florida, and the record discloses *no solicitation of business in that State either in person or by mail.* * * * In *McGee*, the nonresident defendant *solicited* a reinsurance agreement with a resident of California. * * * But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the [trust] agreement as the *solicitation* in *McGee.*" (Emphasis added.) 357 U.S. 234, 251-252, 2 L.ed.2d 1283, 1296, 78 S.Ct. 1228, 1238-1239.

Thus, solicitation which is of prime importance in satisfying the "minimal connections" requirement in the use tax cases is of equal importance in satisfying the "minimal contacts" requirement necessary for the exercise of *in personam* jurisdiction with substituted service of process. Also significant is the fact that the solicitation, which was so important in the *McGee* case, was by mail. (See also, *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 94 L.ed. 1154, 70 S.Ct. 927.) We hold that defendant's continuous local solicitation for mail orders followed by delivery of the ordered goods to customers in Illinois constitute the "minimal contacts" between defendant and Illinois that are requisite to the exercise of *in personam* jurisdiction over it.

This brings us to the question of whether section 12a provides a reasonable method of notification. The section states that a true and certified copy of the process or notice shall be sent to the taxpayer by registered or certified mail at his last known address. In the *International Shoe Co.* case the court said, "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to

apprise appellant of the suit." (326 U.S. 310, 320, 90 L.ed. 95, 104, 66 S.Ct. 154, 160.) We are of the opinion that section 12a gives the person to be served or notified "a realistic opportunity to appear and be heard." See *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 436.

The record shows that on January 21, 1963, a certified copy of the notice of proposed assessment was sent by registered mail addressed to defendant's North Kansas City office. On June 26, 1963, a certified copy of final assessment was sent by registered mail addressed to defendant's North Kansas City office and on January 23, 1964, a certified copy of *alias* summons, with a copy of the complaint attached, was sent by registered mail to defendant's North Kansas City office. Defendant did not respond to the notice of proposed assessment or final assessment, but it did make a special appearance to contest the jurisdiction of the circuit court. There is nothing in the record to show that defendant did not have adequate notice or sufficient time to prepare its defenses and appear.

Defendant also argues that section 12a does not apply to it. To support this argument it first points out that the section states, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State * * *." Defendant then contends that it receives no privilege from Illinois.

The plain intent and meaning of section 12a is to provide a method of substituted service on a nonresident "acting as a retailer maintaining a place of business in this State within the meaning of Section 2." Whether Illinois extended the "privilege" or defendant accepted the "privilege" is academic because, as we have pointed out, defendant is "maintaining a place of business in this State

within the meaning of Section 2" and the application of 12a to defendant did not deprive it of due process of law.

Also in support of its argument that section 12a is not applicable to it, defendant points out that the section provides for mailing a copy of the notice or process "to the taxpayer * * * addressed to such taxpayer at his last known address." Since defendant is a collector of the tax rather than a "taxpayer" it concludes that the section does not apply to it.

As we just pointed out, section 12a provides a method of substituted service on persons who have incurred a liability under the Use Tax Act. The section clearly provides in the first sentence that it is to apply to (1) nonresident vendors, (2) resident vendors who subsequently move from the State or conceal their whereabouts and (3) resident or nonresident users who move from the State or conceal their whereabouts. The section thereafter uses the word "taxpayer" in a generic, and not in a technical, manner to cover all three categories of persons who may have incurred liability under the act and cannot be served with process in the State. The section clearly applies to defendant.

The constitutional issues argued by *amici curiae* are essentially the same as those argued by defendant. They do contend, however, that equal treatment has not been accorded resident and nonresident vendors with regard to their respective liabilities under the Retailers' Occupation Tax Act and the Use Tax Act on credit sales. Since there is nothing in the record concerning credit sales, we need not consider this question. Nor will we consider a memorandum of the Department of Revenue concerning sales for resale and its effect on manufacturers and wholesalers, since there are no sales for resale involved in this case.

The remaining questions raised by defendant can be disposed of summarily. Defendant argues that the com-

plaint should have been dismissed because the verification was not personally signed by Harry L. Hulman, Director of the Department of Revenue. Verification of the complaint was not necessary. (Ill. Rev. Stat. 1961, chap. 110, par. 35.) It also argues that the trial court erred in entering a summary judgment because there were genuine issues of material fact raised by the pleadings. Defendant does not state what those issues are and our examination of the pleadings does not reveal any such issues. It is also argued that summary judgment should not have been entered because two affidavits of Director Hulman were not personally signed by him and the affidavit of Attorney General William G. Clark consists only of argument and conclusions of law. As we just mentioned, the pleadings do not show any genuine issues of material fact.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Appendix B

JUDGMENT OF THE SUPREME COURT OF THE STATE OF ILLINOIS

Be it remembered, that, to-wit: on the 25th day of January 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE

No. 39330 vs.

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT

Appeal from
Circuit Court
Cook County
63 C 21015

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County

aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed by name and affixed the Seal of said court this 29th day of March, 1966.

(SEAL)

(s) Mrs. Earle Benjamin Searcy,
Clerk,
Supreme Court of the State of Illinois.

Appendix C

STATUTES INVOLVED

A.) The ILLINOIS USE TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*), insofar as it is sought by plaintiff to be applied to defendant in the attendant circumstances. The Court's attention is directed especially to Sections 2, 3, 3a, 5, 6, 7, 8, 9, 12, 12a and 14 of such Act.

Section 2 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.2, as amended by the Act of July 17, 1961):

> "*439.2 Definitions.*] § 2 'Use' means the exercise by any person of any right or power over tangible personal property incident to ownership of that property, • • •. 'Use' shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property • • •.
>
> " 'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property, through a sale at retail.
>
> " 'Purchaser' means any person who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.
>
> " 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration.• • •.
>
> "• • • • • •
>
> " 'Retailer maintaining a place of business in this State,' or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising whether such orders are received or accepted within or without this State."

Section 3 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 110, § 439.3):

"*439.3 Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exceptions.*] §3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of 2½% of the selling price of such property if purchased before July 1, 1959, or after June 30, 1965, and at the rate of 3½% of the selling price of such property if purchased after June 30, 1959, and prior to July 1, 1965 * * *

"The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *, and remitted to the Department [of Revenue], pursuant to the provisions of Section 9 hereof.

"The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

"Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. * * *

" * * * * * *"

Section 3a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.3a):

"*439.3a Method of stating tax.*] § 3a. Wherever possible the tax imposed by the Act shall when collected be stated as a distinct item separate and apart from the selling p. e of the tangible personal property.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.5):

"§ *439.5 Receipts—List of agents.*] § 5. * * * every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made in or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchaser) a receipt therefor in the manner and form prescribed by the Department [of Revenue]. * * *."

Section 6 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.6):

"*439.6 Certificate and Sub-Certificate of Registration—Separate certificates—Foreign retailers—Permit to collect tax.*] § 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, * * *. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department [of Revenue] (upon a form prescribed

and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the applicant states in his application to be the principal place of business or location from which he will act as a retailer in this State.* * *. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

"The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements * * * as a retailer maintaining a place of business within this State.* * *."

Section 7 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.7):

"*439.7 Direct or indirect advertisement that retailer will absorb tax prohibited—Penalties.*] § 7 It is unlawful for any retailer to advertise or hold out or state to the public or any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed

by Section 3 hereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added, that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department [of Revenue] under the Retailers' Occupation Tax Act or under this Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act."

Section 8 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.8):

"*439.8 Tax collected as debt owed to state—Exception.*] § 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction."

Section 9 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.9):

"*§439.9 Due date—Conditional sales—Refunds—Joint and separate returns—Fund.*] § 9 * * * each retailer required or authorized to collect the tax herein imposed shall pay to the Department [of Revenue] the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, which-

ever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request.* * *.

"* * * * * *"

Section 12 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12):

"*439.12 Applicable sections and exceptions.*] § 12. All of the provisions of Sections 2a, 2b, 3, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c, 5d, 5g, 5h, 8, 9, 10, 11, 12 and 12½, of the 'Retailers' Occupation Tax Act' in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Section 12a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12a, as added by the Act of July 25, 1961):

"*439.12a Appointment of secretary of state for service of process—Force and effect of service.*] § 12a. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals

his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit."

Section 14 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 14):

"*439.14 Violations—Penalties.*] § 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of

Section 9 or Section 10 hereof, or who fails to keep books and records as reqquired herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department [of Revenue] for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

"Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

" • • • • • "

"This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupational Tax Act."

B.) The ILLINOIS RETAILERS' OCCUPATION TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 440 *et seq.*), insofar as it is sought by appellee to be applied to appellant in the attendant circumstances.* The Court's attention is directed especially to Section 5 of such Act.

---

*In this regard, see Section 12, Illinois Use Tax Act, *supra*.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 444):

"444. *Failure to make return—Failure to pay tax.*]

* * * * * *

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department [of Revenue] shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. * * *. The Department shall notify such person or his legal representative, as such, as provided in this Act, of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. * * *. If a protest to the proposed assessment and a request for a hearing thereon is not filed 20 days after notice of the proposed assessment, the Department shall issue a final assessment to such person or to the legal representative of such person.

"* * * * * *"

BLANK

PAGE

JUL 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO [redacted] 241

NATIONAL BELLAS HESS, INCORPORATED,

Appellant,

VS.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (FInancial 6-2000),
Attorney for Appellee.

RICHARD A. MICHAEL,
Assistant Attorney General,
TERENCE F. MACCARTHY,
Special Assistant Attorney General,
Of Counsel.

Printed by Authority of the State of Illinois [redacted] 965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1423

NATIONAL BELLAS HESS, INCORPORATED,
Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

(ON APPEAL FROM THE SUPREME COURT OF ILLINOIS)

MOTION TO DISMISS.

The Department of Revenue of the State of Illinois, appellee herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the ground that said appeal does not present a substantial federal question.

ARGUMENT.

The appellant states the issue in this case in these words "whether a State may constitutionally require an out-of-State business to collect and pay the taxes levied on its residents' subsequent use of the goods where the out-of-State business has only two points of contact with the jurisdiction: (1) it regularly mails catalogs and flyers soliciting mail orders into the State as a part of a nation-wide distribution and (2) it ships goods which it has sold into the State by mail or common carrier" (*Jurisdictional Statement* page 8).

This is a correct statement of the issue in this case. Appellant stresses the importance of the issue by stating that this is a question that has never been decided by this Court and citing the report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee which stated the question is "the most important judicial uncertainty at present." (*Jurisdictional Statement* page 9).

The question is uncertain and substantial only if the cases on the power of a state to require an out-of-state seller to collect a use tax on sales to its residents are read with emphasis on facts in each case which this Court did not deem significant in deciding them. If these cases are read as a unit and their rationale clearly understood, it becomes abundantly clear that this case was correctly decided by the Illinois Supreme Court and that no substantial federal question is presented by this appeal.

Early important cases in the development of the law on this issue were *Nelson* v. *Sears Roebuck and Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward*, 30 U.S. 373. In these cases this Court held a state could compel a retailer with retail stores in a state to collect a use tax on sales to

its residents even though these sales were made from out-of-state branches on the basis of catalog orders. In the latter case the following significant comment was made by the Court:

> "There is a further fact in this record which makes reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward and Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog. This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that such solicitation was done through local advertising rather than directly by local agents as in *Felt* and *Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 59 S.Ct. 376, 83 L.Ed 488 is immaterial. Nor is it material that the orders were filled by direct shipments from parts outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt and Tarrant Mfg. Co.* v. *Gallagher*, supra."

Thus there was an express holding by this Court that solicitation by advertising in the state was the equivalent to solicitation by local agents and that either was sufficient to support the legislative jurisdiction of the state to require that the out of state retailer collect a use tax on its sales to residents of that state. Thus is the situation in the instant case.

In *General Trading Co.* v. *Tax Commission* 322 U.S. 335, the Court reaffirmed its position that the presence of local agents or retail outlets is immaterial with regard to the power of a state to compel an out-of-state retailer who regularly solicits business in a state to collect a use tax on its sales to residents in that state. Although on the

facts on the case the company did solicit orders by travelling salesmen in the state the Court said at page 338:

> "The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a state as in *Gallagher* case, compared with the apparently similar needs for soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail orders forwarded into Iowa from without the state. All these differentiations are without constitutional significance."

If as this Court indicated the presence of the retail stores was constitutionally irrelevant in the *Sears* and *Montgomery Ward* cases, the remaining facts are identical with those in this case—solicitation of sales in a state on the basis of catalogs shipped into the state by an out-of-state retailer. The instant case has been forseen and decided by this Court.

From a chronological standpoint the next significant case was *Miller Bros.* v. *Maryland*, 347 U.S. 340. In that case the defendant was a department store located in Delaware, and the issue was whether Maryland could require this defendant to collect its use tax from Maryland residents who came to its store to purchase goods. Its contacts with Maryland were as follows:

1) It advertised in Delaware newspapers and on its radio stations which advertising was heard and read by Maryland residents.

2) Occasional sales circulars were mailed to all former customers some of whom resided in Maryland.

3) It delivered goods purchased at its store by Maryland residents to their homes by common carrier and by its own truck.

This Court held that this contact was insufficient to support Maryland's legislative jurisdiction. The Court explained the *rationale* of its decision at page 347:

> "[T]here is a wide gulf between this type [the type in the *General Trading* case] of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland."

Thus this Court in a five to four decision reversed the case on the basis that the company there involved was not exploiting the consumer market in Maryland. The facts in the instant case are far different for even the issue as stated by the appellant shows that through regular and continuous catalog mailings to Illinois residents there is an exploitation of the Illinois consumer market of such a nature which justifies the State of Illinois' requirement that appellant collect the use tax on its sales to Illinois residents.

The latest expression of the views of this Court are this issue is found in the decision of *Scripto* v. *Carson* 362 U.S. 207 where this Court held that the regular solicitation of orders in Florida by ten "independent contractors" who were agents of Georgia corporation which had no other contact with Florida was a sufficient nexus to support the requirement that the corporation collect the Florida use tax on its sales to Florida residents. In distinguishing the *Miller Brothers* case this Court again emphasized the fact that the exploitation of the consumer market in a state is the key to its legislative jurisdiction on this issue and that

catalog solicitation may be sufficient for this purpose. The Court said at page 212:

> "Appellant earnestly contends that *Miller Bros. Co.* v. *Maryland, supra* is to the contrary. We think not. Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular systematic displaying of its products by catalogs, samples or the like."

Clearly to say that the existence of ten part-time independent contractors in a state who accept orders for out-of-state firms is such an "exploitation of the consumer market" as would justify the legislative jurisdiction of a state to require it to collect a use tax on sales to the residents of the state but that regular and continuing catalogue solicitation in the state is not, is to elevate form over substance. No substantial differences exist between the two forms of solicitation.

Thus this Court has clearly, and on at least three different occasions stated that the existence of agents or retail outlets in a state is immaterial with regard to legislative jurisdiction of a state to require the collection of its use tax, but that rather the issue is whether there is such a regular and continuous solicitation in the state as to amount to an exploitation of its retail market.

The rationale behind this result in these cases is well expressed by Mr. Justice Rutledge in his opinion reported at 322 U.S. 349, in which he concurred in *Harvester Co.*, v. *Dept. of Treasury*, 322 U.S. 340, and the *General Trading case*, 322 U.S. 335 and dissented in *McLeod* v. *J. E. Dilworth Co.* in this opinion be said at page 354:

> "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines

this process in terms as 'a retailer maintaining a place of business in this state'. The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer."

Since the prior decisions of this Court thus establish that for these purposes regular solicitation is "doing business" in a state, there can be no question but that the State of Illinois had legislative jurisdiction over the appellant and thus the decision of the Supreme Court of Illinois in no way violated the Due Process Clause of the Fourteenth Amendment by making its laws applicable to appellant.

It is equally clear that there is no violation of the Commerce Clause. The burden on appellant is no greater than that placed on Sears Roebuck, Montgomery Wards or Scripto by the prior decisions of this Court. Indeed instead of discriminating against interstate business, this requirement merely treats all retailers who sell to Illinois residents equally. Any other result would discriminate against local business in favor of an out-of-state retail merchant.

Finally to require such a merchant to be subject to the *in personam* jurisdiction of courts of Illinois for the sole purpose of collecting any such funds not voluntarily collected, is not a violation of Due Process any more than requiring them to collect them in the first place. For these

purposes regular and continuous solicitation is the equivalent of "doing business", and it is well established the courts of the state have *in personam* jurisdiction over a corporation doing business within its borders.

Since the prior decisions of this Court make manifestly clear that continuous solicitation in a state is sufficient for a state to require an out-of-state retailer to collect a use tax on sales to its residents, and since the very issue as presented by appellants shows they are engaged in such solicitation, no substantial federal question is presented. The decision of the Illinois Supreme Court was clearly correct, and this appeal should be dismissed for failure to state a substantial federal question.

CONCLUSION.

It is respectfully submitted, therefore, that defendant presents no substantial federal question for the decision of this Court and that this appeal should be dismissed.

Respectfully submitted,

.....

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (FInancial 6-2000),
Attorney for Appellee.

RICHARD A. MICHAEL,
Assistant Attorney General,

TERRENCE F. MACCARTHY,
Special Assistant Attorney General,
Of Counsel.

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
AUG 3 1966
JOHN F. DAVIS, CLERK

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N.Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.

Blanchard Press, Inc., Boston, Mass. — Law Printers

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

Appellee's motion to affirm asks the Court, without argument, to render out-of-State mail order concerns constitutionally subject to the multiple burdens of collecting and paying use taxes according to the laws of each and every State and unit of local government to which they ship customers' orders, solely by reason of their use of the United States mails to send catalogs into the jurisdic-

tion. No such liability had ever been imposed prior to the decision below.

At the same time appellee apparently admits—for it does not deny—the factual basis for our assertion that the imposition of such a liability would be so onerous as unduly to burden interstate commerce and take appellant's property without a jurisdictional nexus.[1] Nor does appellee deny the importance of the question presented, whether judged by the number of concerns and volume of business affected[2] or the common understanding that this Court has never sustained the collection of a use tax from an exclusively mail order business.[3] The sole ground advanced for the motion to dismiss is that the question has been resolved by prior decisions. Accordingly, we content ourselves here with showing that appellee's view ignores both the facts and the reasoning of the earlier cases.

The nub of appellee's analysis of the precedents is summarized on page 6 of its motion in this inaccurate assertion:

> Thus this Court has clearly, and on at least three different occasions stated that the existence of agents or retail outlets in a State is immaterial with regard to the legislative jurisdiction of a state to require the collection of its use tax . . . .

The Court has never stated that the existence of agents in the taxing State is immaterial, except in the sense that

---

[1] Jurisdictional Statement, pp. 9, 14-16. Appellees only response is that its statute "merely treats all retailers who sell to Illinois residents equally." (Motion to Dismiss, p. 7). This is a gross over-simplification. While nominally similar the actual impact of the obligation upon out-of-State mail order firms is entirely different from its impact upon a local merchant for reasons pointed out in the Jurisdictional Statement.

[2] Jurisdictional Statement, p. 17.

[3] *Id.*, at pp. 13-14.

it has held it irrelevant whether the local solicitors are technically "agents" or independent contractors. That technical distinction is no help to appellee's argument because appellant has no representatives of any kind in Illinois and the question is whether the duty to collect the tax may be imposed when there are only mail order sales and no representatives. Plainly the Court has never held or stated that the presence of solicitors or other representatives is immaterial. On each of the three occasions on which the imposition of liability to collect the tax was sustained, the Court stressed the presence of either local outlets or local representatives. In the only case in which there was neither a local outlet nor any other local representatives the Court held that the imposition of the liability would violate the Fourteenth Amendment.

(a) In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, the retailers had local outlets within the jurisdiction. That fact was stressed in both opinions. Appellee asserts (p. 3) that "there was an express holding that . . . solicitation by advertising in the state was the equivalent to solicitation by local agents." Appellant speaks of "advertising" but the Court used the phrase "*local* advertising"[4] to describe the advertising by the local retail outlets. The very passage quoted by appellee from the opinion shows that appellee omits the crux of the decision. The Court said—

> It was stipulated that "advertisments have been caused to be printed *by the retail stores* of petitioner (Montgomery Ward and Co.) in the State of Iowa . . . . [Emphasis supplied.]

[4] Emphasis supplied.

The Court continued—[5]

> The fact that *such solicitation* was done through local advertising rather than directly by local agents as in *Felt and Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. [Emphasis supplied.]

Thus, the holding was only that *local* advertising of the mail order business by the *local* retail stores was not to be distinguished from face to face solicitation by *local* agents. This is a far cry from the claim that mailing catalogs into a State through the United States mail gives it and every other State into which catalogs are mailed jurisdiction to require the out-of-State vendor to collect a local use tax on goods shipped into the jurisdiction.

(b) In *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335, the retailer sent a sales force into the jurisdiction. The Court held that *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, was dispositive *because the interstate business was solicited by local agents.* This is apparent from the very passage quoted by appellee in its present motion (p. 4):

> The *Gallagher* case is indistinguishable— certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine from without a state as in the *Gallagher* case, compared with the apparently simpler needs for soliciting here.

Manifestly the Court was talking about the local solicitation described in its statement of the facts, not about out-of-State use of the United States mails.

(c) Appellee cites *Scripto, Inc.* v. *Carson*, 362 U.S. 207, as the third occasion on which the Court "stated that the

---

[5] One intervening sentence is omitted.

existence of agents or retail outlets in a State is immaterial . . .'' Mr. Justice Clark's opinion makes it perfectly clear that the Court predicated its *Scripto* decision largely upon the proof that ten jobbing firms were acting as Scripto's sales representatives within the State. After saying that there must be ''some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,'' the Court said (p. 211)—

> We believe that such a nexus is present here. First, the tax is a nondiscriminatory exaction . . . . Next, as Florida points out, appellant has 10 wholesalers, jobbers, or ''salesmen'' conducting continuous local solicitation in Florida and forwarding the resulting order from that State to Atlanta for shipment of the ordered goods.

And the very first point made by Justice Clark in distinguishing *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, from *Scripto* was that, ''Miller had no solicitors in Maryland.''

The short of the matter is that there is nothing in this Court's prior decisions holding that sending catalogs into a State through the United States mails is an adequate basis for requiring an out-of-State vendor to collect and pay over a local tax upon any purchaser's local use of the advertised goods. In all the cases to date the Court has rested decisions sustaining the liability upon some local activity by local representatives. It was their presence alone which gave jurisdiction to tax and justified the burden upon interstate commerce. The highest court of Alabama, the special subcommittee of the Judiciary Committee of the House of Representatives and the commentators all recognize this essential point.[6] Appellee not only fails to

---

[6] Jurisdictional Statement, pp. 12-14.

mention them but cites no contrary authority, except the decision below.

Conclusion

The motion to affirm should be denied. Probable jurisdiction should be noted.

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N.Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.

August 1966.

BLANK

PAGE

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 6 1967
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Question Presented	4
Statement	4
1. The Illinois Use Tax	4
2. Appellant's Business	5
3. Proceedings Below	6
Summary of Argument	8
Argument	11
Illinois lacks constitutional power to require collection of its use tax by an out-of-State mail order business	11
A. The established rule is that a State may not impose extraterritorial liability to collect use taxes upon sellers having neither property nor representatives within the jurisdiction	15
B. The rule that a State may not impose upon out-of-State sellers extraterritorial liability to collect local use taxes is sound in principle	21
1. The obligation to collect use taxes wherever their customers were located would impose cumulative, and therefore discriminatory, burdens upon an out-of-State mail-order business	22
2. Out-of-State mail-order firms receive no benefits from the taxing State	32
3. Out-of-State mail-order firms have no opportunity to participate in self-government in the jurisdiction imposing the tax	35
4. Local merchants would suffer no significant competitive disadvantage from failure of out-of-State mail-order firms to collect the local use tax	37

Page

C. The settled limitations upon jurisdiction to require extraterritorial collection of a use tax should not be disturbed without congressional action 39
Conclusion 45
Appendix A 46
Appendix B 55

Table of Citations

Cases

American Oil Co. v. *Neill*, 380 U.S. 451 ..... 12, 34
Baldwin v. *Seelig, Inc.*, 294 U.S. 511 37
Central R. Co. v. *Pennsylvania*, 370 U.S. 607 14
Cooley v. *Board of Wardens*, 12 How. 299 42
Edwards v. *California*, 314 U.S. 160 ..... 10, 36
Felt & Tarrant Mfg. Co. v. *Gallagher*, 306 U.S. 62 15, 17, 18
General Trading Co. v. *Tax Comm'n*, 322 U.S. 335 17, 33
Halliburton Oil Well Co. v. *Reilly*, 373 U.S. 64 25
Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525 31
In Re Rahrer, 143 U.S. 545 42
Katzenbach v. *Morgan*, 384 U.S. 641 42
Lawrence v. *State Tax Comm'n*, 286 U.S. 276 32
McGee v. *International Life Ins. Co.*, 355 U.S. 220 ... 13
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 36
McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327 12
Miller Bros. Co. v. *Maryland*, 337 U.S. 340 ... 8, 12, 15, 18, 19, 20, 21, 42
Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373 16, 31, 33

Page

Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365 ... 8, 15, 16, 20, 31, 33, 42

Nippert v. *Richmond*, 327 U.S. 416 ... 25, 36

Northwestern Portland Cement Co. v. *Minnesota*, 358 U.S. 450 ... 22, 33, 42

Norton Co. v. *Department of Revenue*, 340 U.S. 534 ... 12

Ott v. *Mississippi Barge Line Co.*, 336 U.S. 169 ... 33

Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 ... 42

Scripto, Inc. v. *Carson*, 362 U.S. 207 ... 20, 23, 43

South Carolina Highway Dept. v. *Barnwell Bros.*, 303 U.S. 177 ... 10, 35

Standard Oil Co. v. *Peck*, 342 U.S. 382 ... 31, 33

State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So.2d 91 (1965) ... 12, 41

State Board of Insurance v. *Todd Shipyards Corp.*, 370 U.S. 451 ... 42

Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435 ... 9, 33

Constitution and Statutes

Federal Statutes:

Act of April 7, 1961, 75 Stat. 41 (1961) ... 23, 43

Act of September 19, 1959, 73 Stat. 555 (1959) ... 23, 42

Constitution of the United States:

Article I, Section 8 (Commerce Clause) ... 4, 7, 14, 36

Fourteenth Amendment (Due Process Clause) 4, 6, 7, 8, 14, 15

U. S. Code:

28 U.S.C. 1257(2) ... 2

2101(c) ... 2

State Statutes:

Alabama Code tit. 51, § 788 (Supp. 1965) ... 27

Arizona Rev. Stat. Ann. §§ 42.1408 (1956), 42-1361 (Supp. 1966) ... 26

Arkansas Stat. Ann. § 84-3105 (1960) ... 26

Page

California Rev. & Tax Ann. Code
Section 6201 26
Section 6359 63
Section 6369 64
Colorado Rev. Stat. Ann.
Section 138-5-6, as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para. 26-055 (July 8, 1965)) 26
Section 138-5-14(f), as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para. 26-064 (July 8, 1965)) 63, 64
Connecticut Gen. Stat. Ann.
Section 12-411 (Supp. 1966) 27
Section 12-412(d) (1958) 64
Section 12-412(j) (1958) 63
Section 12-412(m) (1958) 63
Section 12-412(s) (1958) 63
District of Columbia Code Ann.
Section 47-2605(o) (1961) 64
Section 47-2605(p) (1961) 63
Section 47-2702 (Supp. 1966) 26
Section 47-2706(b) (1961) 64
Florida Stat. Ann.
Section 212.05 (Supp. 1965) 26
Section 212.08(1) (Supp. 1965) 63
Section 212.08(2) (Supp. 1965) 63, 64
Georgia Code Ann. § 92-3402a (1961) 26
Hawaii Use Tax § 119-2(c), 2 CCH Sales Tax Rep. para. 32-418 (April 28, 1966) 27
Idaho Code Ann. § 63-3621 (Supp. 1965) 26
Illinois Ann. Stat. ch. 120 § 439.3 (Smith-Hurd Supp. 1966) 27, 64
Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*) 2

Page

Illinois Use Tax Act (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*) 1, 4, 7, 41
Section 2 ..... 2, 3, 5
Section 3 2
Section 12a 2, 5, 6
Indiana Ann. Stat.
Section 64-2654(b) (13) (Supp. 1966) 64
Section 64-2656 (Supp. 1966) 26
Section 64-2658 (Supp. 1966) 64
Iowa Code Ann. § 423.2 (1949) 26
Kansas Stat. Ann. § 79-3703 (Supp. 1965) 26
Kentucky Rev. Stat. Ann. § 139.310 (Baldwin 1963) 26
Louisiana Rev. Stat. § 47.302 (1952) 26
Maine Rev. Stat. Ann. tit. 36
Section 1760(3) (1964) 63
Section 1760(5) (1964) 64
Section 1861 (Supp. 1966) 27
Maryland Ann. Code art. 81
Section 326 (1)—(1965) 64
Section 326 (m)—(1965) 64
Section 326 (s)—(1965) 63
Section 373 (1965) 26
Massachusetts Retail Sales Tax
Section 1(6)(h), 3 CCH Sales Tax Rep. paras. 43-056, 43-212 (March 15, 1966) 63
Section 1(6)(k), 3 CCH Sales Tax Rep. paras. 43-059, 43-212 (March 15, 1966) 63
Section 1(6)(l), 3 CCH Sales Tax Rep. paras. 43-060, 43-212 (March 15, 1966) 64
Section 2(2), 3 CCH Sales Tax Rep. para. 43-208 (March 15, 1966) 26
Section 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-056, 43-212 (March 15, 1966) 63
Section 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-059, 43-212 (March 15, 1966) 63

Page

Section 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-060, 43-212 (March 15, 1966) 64
Michigan Stat. Ann. § 7.555(3) (Supp. 1965) 27
Mississippi Code Ann. §§ 10108, 10146-03 (Supp. 1964) 27
Missouri Ann. Stat. §§ 144.020, 144.610 26
Nevada Rev. Stat. § 372.185 (1963) 26
New Jersey Stat. Ann.
Section 54:32B-8(a) (Supp. 1966) 64
Section 54:32B-8(b) (Supp. 1966) 63
Section 54:32B-8(d) (Supp. 1966) 63
New Mexico Stat. Ann. § 72-17-3 (Supp. 1965) 26
New York Tax Law
Section 1110 26
Section 1115(a)(1) 63
Section 1115(a)(3) 64
Section 1115(a)(4) 64
North Carolina Gen. Stat.
Section 105-164.6 (1965) 26
Section 105-164.13(12) (1965) 64
Section 105-164.13(13) (1965) 64
North Dakota Cent. Code Ann.
Section 57-39-03.7 (1960) 64
Section 57-40.02 (Supp. 1963) 26
Section 57-40.03 (1960) 64
Ohio Rev. Code Ann.
Section 5739.02(B)(2) (Page Supp. 1966) 63
Section 5739.02(b)(22) (Page Supp. 1966) 64
Section 5741.02 (Page 1966) 26
Section 5741.02(C)(2) (Page Supp. 1966) 63, 64
Oklahoma Stat. Ann. tit. 68 § 1402 (1966) 26
Pennsylvania Stat. Ann. tit. 72
Section 3403-202 (1964) 27
Section 3403-203(m) (1964) 64
Section 3403-203(q) (1964) 63
Section 3403-203(u) (1964) 63

Page

Rhode Island Gen. Laws Ann.
Section 44-18-20 (Supp. 1965) 27
Section 44-18-30(J) (1956) 63
Section 44-18-30(K) (1956) 64
Section 44-18-30(L) (1956) 64
South Carolina Code Ann. § 65-1421 (1962) 26
South Dakota Code § 57.4303 (Supp. 1960) 27
Tennessee Code Ann. § 67-3003 (Supp. 1966) 27
Texas Tax-Gen.
Article 20.03 (Supp. 1966) 26
Article 20.04(K) (Supp. 1966) 63
Article 20.04(L) (Supp. 1966) 64
Utah Code Ann. § 59-16-3 (Supp. 1965) 27
Virginia Retail Sales and Use Tax
Section 58-441.5 (4 CCH Sales Tax Rep. paras. 73.129-73.132 (March 29, 1966) 26
Section 58-441.6(s) (4 CCH Sales Tax Rep. para. 73-153 (March 29, 1966)) 64
Washington Rev. Code Ann. § 82.12.020 (Supp. 1966) 27
West Virginia Code Ann. § 999(30b) (Supp. 1965) .. 27
Wisconsin Stat. Ann.
Section 77.52 (Supp. 1966) 65
Section 77.53 (Supp. 1966) 27
Section 77.53(1) (Supp. 1966) 65
Wyoming Stat. Ann. § 39-311 (Supp. 1965) 26

Miscellaneous

Brown, The Open Economy, 67 Yale L.J. 219 (1958) 31
Commerce Clearing House Sales Tax Rep. para. 301 27
Congressional Record, Vol. 112, Sept. 30, 1966 24
Farrand, Records of the Federal Convention, vol. II, III 37
The Federalist, No. XLII 37

Page

U. S. Bureau of the Census, Dept. of Commerce 1963 Census of Business, Retail Trade, U. S. Summary 39, 40

U. S. Congress. H. Rept. 2013, 89th Cong., 2d Sess. (1966) 10, 19, 23, 44

H. Rept. 16491, 89th Cong., 2d Sess. (1966) 10, 14, 23, 44

S. Rept. 1574, 86th Cong., 2d Sess. ... 43

S. 3549, 86th Cong., 2d Sess. 43

Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965) 9, 10, 20, 22, 23, 23-45

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Illinois (R. 86-99) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against appellant to collect taxes alleged to be due from appellant under the Illinois Use Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120,

§§ 439.1 *et seq.*) and pertinent provisions of the Illinois Retailers' Occupation Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966 (R. 100). Notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966 (R. 101). This Court noted probable jurisdiction on October 10, 1966 (R. 106). Its jurisdiction rests on 28 U.S.C. 1257(2) and 2101(c).

Statutes Involved

The Illinois Use Tax Act, section 2, as amended by the Act of July 17, 1961 (Ill. Rev. Stats. [1963], ch. 120, § 439.2) provides in critical part—

> "Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:
>
> 1. . . .
>
> 2. Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Section 3 (Ill. Rev. Stats. [1963], ch. 120, § 439.3) provides in pertinent part:

> The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State . . . and remitted to the Department. . . .

Section 12a (Ill. Rev. Stats. [1963], ch. 120, §439.12a) provides:

Appointment of secretary of state for service of process—Force and effect of service. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made

such service, with a copy of the process or notice that was so served attached to such affidavit.

Related sections of the Illinois Use Tax Act are reprinted in Appendix A, pp. 46-54 below.

Question Presented

Whether it violates the commerce clause or the Fourteenth Amendment for a State to make an out-of-State mail-order house, with no property, offices, warehouses, or agents or other representatives within the jurisdiction, liable for collection of the tax levied upon its customers' use of goods where its only contact with the State is (a) addressing catalogs to local residents through the United States mail and (b) sending the goods to local customers by mail or common carrier.

Statement

1. *The Illinois Use Tax*

Since 1955 Illinois has levied a use tax upon the privilege of using in Illinois "tangible personal property purchased at retail . . . from a retailer." Ill. Rev. Stat. [1963], ch. 120, § 439.1 *et seq.* The statute provides that the use tax shall be collected from the purchaser by any retailer "maintaining a place of business in this State," and makes the obligation a debt of the retailer regardless of whether the tax is actually collected *(Ibid.)*

The term "retailer maintaining a place of business within this State" was originally given a conventional meaning requiring some local establishment such as an office, distribution house, sales house or warehouse. On July 17, 1961 Illinois expanded the term "maintaining a place of

business'' artificially to include (Ill. Rev. Stat. [1963], ch. 120, par. 439.2)—

> Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Illinois also added to the Use Tax Act a new Section 12a providing that any non-resident "who accepts the privilege . . . of acting as a retailer maintaining a place of business in this State'' shall be deemed to appoint the Secretary of State his agent for the service of process in any proceeding under the Act. Service was to be made by delivering a copy to the Secretary of State and mailing a copy to the taxpayer. Ill. Rev. Stat. [1963], ch. 120, par. 439.12a.

2. *Appellant's Business*

The new, artificial definition brought appellant within the reach of the statute, if constitutional. Appellant is a national mail order concern incorporated in Delaware, whose only offices and warehouse are located in Missouri (R. 19, 32-33, 55, 68-69). Twice a year appellant mails catalogs from Missouri to a list of over five million customers resident throughout the United States (R. 68-69). It also mails out and encloses in merchandise smaller intermediate sales books and flyers (R. 70). All orders are received and accepted in Missouri (R. 70-71). All goods are shipped from outside Illinois either by mail or common carrier (R. 70).

Appellant has no other contact with Illinois. It is qualified to do business only in Delaware and Missouri. It has never registered with the Illinois Department of Revenue

under the Use Tax Act. As noted by the court below, it "does *not* maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does *not* have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells; it does *not* own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has *not* advertised its merchandise for sale in newspapers, on billboards or by radio or television in Illinois" (R. 87, emphasis added).

On January 21, 1963 appellee issued a proposed assessment in the sum of $74,593.75 for "delinquent" Use Taxes for the period July 17, 1961 through October 31, 1962, plus a 25 percent penalty of $18,648.43, for a total of $93,242.18. The period of the assessment thus began the day of the enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment. Defendant declined to pay (R. 5-8, 63).

3. *Proceedings Below*

This action was thereupon instituted by appellee in the Circuit Court of Cook County on October 15, 1963 to recover from appellant the use taxes assessed as above (R. 1-11). Service was made by leaving a copy of the summons and complaint with the Illinois Secretary of State and mailing a copy to appellant in Missouri in accordance with the 1961 amendment to Section 12a of the Illinois Use Tax Act (R. 11-12).

By special appearance appellant challenged, under the Fourteenth Amendment, the power of the circuit court to render an *in personam* judgment on the basis of such substituted service and notice by mail to a defendant whose only contact with Illinois was sending catalogs, advertising

flyers and merchandise into the State from outside the jurisdiction (R. 18-19, 23, 32-34). Although the motion to quash the process was denied, appellant preserved its objection to the jurisdiction throughout the proceedings in the Illinois courts (R. 88-89, 93).

By its motion to strike or dismiss the complaint (R. 38, 43-52) and again by its answer (R. 54, 56), appellant raised the constitutional contention that the Use Tax Act, insofar as it makes appellant liable for the use tax upon Illinois purchasers, is: (i) a denial of due process of law under the Fourteenth Amendment because appellant has not sufficient minimum relation to Illinois to furnish jurisdiction to regulate or tax; and (ii) violative of the commerce clause because requiring appellant to collect the tax imposes an undue burden upon interstate commerce. The circuit court entered summary judgment on motion of appellee (R. 75-76), and appellant appealed (R. 77 *et seq.*).

The Supreme Court of Illinois considered and specifically rejected appellant's three claims under the United States Constitution. It put its decision squarely upon the ground that (R. 93)—

> the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogs and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders [by such catalogs and advertising] followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Summary of Argument

A.

Under a consistent line of decisions in this Court a State may not constitutionally require an out-of-State mail-order seller to collect use taxes on sales to local buyers unless the seller has a definite link with the jurisdiction such as retail outlets or other business property, or salesmen or other personnel, within the State. Merely sending advertising and merchandise into the State, by mail or common carrier, as part of a general interstate distribution does not provide the requisite nexus. When it upheld the power of Iowa to require a mail-order seller to collect the local use tax on all sales to Iowa purchasers, the Court put the decision upon the ground that the seller maintained local retail stores; the Court also observed that the situation of out-of-State mail-order firms was different because "unlike respondent, they are not receiving benefits from Iowa for which it has power to exact a price." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365. Later, where the seller had neither a local outlet nor local representatives, the Court held that to require the out-of-State seller to collect the use tax because it engaged in intensive advertising and made regular deliveries of merchandise within the taxing State, would violate the Fourteenth Amendment. *Miller Bros.* v. *Maryland*, 347 U.S. 340. All the other decisions sustaining obligations to collect use taxes were expressly based upon the presence of local stores or local solicitors.

B.

The line drawn by those decisions is sound in principle. Mail-order sales have long been significant factors in open-

ing the minds and raising the living standards of millions of Americans in communities remote from urban stores. Illinois would restrict this important national market by precluding appellants and thousands of other wholly out-of-State mail-order businesses from sending advertising and goods to Illinois residents as part of a general interstate distribution, unless the out-of-State firms were able and willing to collect taxes for Illinois. The impact will be chiefly upon small, independent enterprises. *Report of the Special Sub-committee on State Taxation of Interstate Commerce of the House Committee on the Judiciary.* H. Rept. 565, 89th Cong., 1st Sess. 770 (1965). For a firm whose advertising ran nationwide, compliance might mean acting as tax collector for every one of the States (now forty-two) with sales and use taxes and also for each of the multitude of local subdivisions that impose use taxes.

Four converging considerations demonstrate that the attempted imposition of this extraterritorial obligation is unconstitutional. *First,* in all cases the obligation would discriminate against out-of-State sellers and interstate commerce. The thesis asserted by Illinois requires out-of-State sellers, unlike local merchants, to comply at one time with the many diverse and often inconsistent laws of different jurisdictions far away from their business locations. *Second,* where the question is one of jurisdiction to tax, the "simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444. Illinois gives appellant none of the benefits of government. Appellant has no stores, no property, no salesmen and no deliverymen in Illinois; nor does it create in Illinois any of the community problems for the solution of which governments must levy taxes. *Third,* the burdens of this extraterritorial obligation fall upon persons outside the State who have no opportunity

to obtain a change of policy through the political process. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185, n. 2; *Edwards* v. *California*, 314 U.S. 160, 174. *Fourth*, the legislation is not required to protect local merchants against unfair competitive disadvantage.

C.

Even if the conclusion were otherwise doubtful, the Court should not now disturb the distinction between (a) businesses with local representatives or related local outlets, which may be subjected to liability to collect use taxes, and (b) exclusively out-of-State businesses, which are immune. The distinction is firmly embedded in business practice and use tax administration. Collection or payment of a use tax in a State where a firm does only a mail order business is virtually unknown. *Report of the Special Subcommittee, etc.*, H.Rept. 565, 89th Cong., 1st Sess. 772. In practice, most State tax administrators have accepted the distinction. *Id.* at 630. After careful study the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on Judiciary found that legislation should be adopted to eliminate "the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting tax." *Id.* at 884. The full House Committee on the Judiciary has now reported legislation which would preserve the *status quo* with respect to mail order sellers by barring the States from requiring the collection of use taxes by sellers who have no permanent business location within the State. H. Rept. 2013, favorably reporting H.Rept. 16491, 89th Cong., 2d Sess. (1966). The established rule should not be upset by judicial

decision in the face of the Court's own precedents, the operating practice and the recommendations of the congressional committee specifically charged with studying the question.

Argument

Illinois Lacks Constitutional Power To Require Collection of Its Use Tax By An Out-of-State Mail Order Business

Illinois seeks, in effect, to compel out-of-State firms to stop using the mails to send advertising and goods to Illinois residents unless they are willing to undertake the extraterritorial obligations of collecting taxes for Illinois and of paying the tax when they cannot collect it. Local merchants whose property and business activities are carried on under the protection of the State government must contribute to its cost. Those interstate traders who gain the benefits of local government through their use of stores or other property, or salesmen or other representatives, within the jurisdiction, may also be required to contribute a fair share of the cost. We submit, however, that the very concept of a national market, which underlies both the commerce and due process clauses, requires that a business whose property and activities are located in one State should be allowed freely to communicate with and ship goods into others without incurring extraterritorial obligations in return for which they receive neither benefits nor protection. The issue in this case lies between the national interest in a free interstate market and the forces of parochialism seeking new sources of revenue and commercial protection in the imposition of extraterritorial obligations.

The Court has long recognized the need to protect the

national economy against State laws imposing obligations insufficiently related to activities within the taxing State. The Chief Justice restated the established constitutional doctrine in *American Oil Co.* v. *Neill*, 380 U.S. 451, 458: "when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax." There must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax". It is also settled, as the Chief Justice noted in the *American Oil* case, that the fact that the vendor knows that goods are destined for use within the taxing State is not enough to validate the imposition of tax liabilities in connection with out-of-State sales which are otherwise insufficiently related to activities of the vendor within the taxing State (*Id.* at 457).[1]

In our view, the relevant test of nexus is whether the out-of-State concern has property or representatives carrying on its business within the taxing State. The Supreme Court of Alabama reached this conclusion upon indistinguishable facts. *State* v. *Lane Bryant*, 277 Ala. 385, 171 So. 2d 91. If this is the test, appellant cannot constitutionally be required to collect and pay the Illinois use tax, for it has neither stores, nor property, nor employees, nor other representatives through which it carries on activities within the jurisdiction. Indeed, appellant is so far removed from Illinois that appellee relies wholly upon notice by registered mail and substituted service of process upon the Illinois Secretary of State in order to claim jurisdiction for its courts.[2]

---

[1] The opinion cited as examples, *Miller Bros.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (sales tax).

[2] Appellant moved to quash the service of process and throughout the proceeding has preserved its right to challenge the jurisdiction

Appellees argue that the mailing of catalogs into Illinois through the United States mails is a sufficient nexus where goods are shipped into the State in response to mail orders. The proposition, as stated in the opinion below (R. 92), is that "the important question is whether there is exploitation of the consumer market by continuous solicitation and not whether the company has used local advertising, brokers or catalogs . . . ." There are already twenty-one sales and use tax States whose statutes attempt to make advertising, by catalog or otherwise, a sufficient nexus (although they have rarely attempted to enforce the obligation).[3] The number of jurisdictions seeking to impose obligations upon out-of-State firms can be expected to grow, for there are forty-two States which impose sales and use taxes.[4] In addition, more than 2,300 units of local government impose sales taxes, many with a compensating use tax. See p. 29 below. The consequence of Illinois' view is to close these interstate markets to out-of-State

---

of the Illinois courts to render a judgment imposing in personam liability. In our view appellant does not have such contacts with Illinois as will permit substituted service with notice by registered mail. The absence of such contacts dramatizes the lack of a nexus sufficient to support tax liabilities. We argue only the latter point, however, because, if the contacts were sufficient to support jurisdiction to impose the substantive tax liabilities to Illinois, then they would probably be held adequate for an enforcement action in the Illinois courts. Cf. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220. The burden of making a defense in a foreign jurisdiction is less onerous than the other burdens of acting as an extraterritorial tax collector, and therefore raises a less serious threat to the preservation of an open national market.

[3] H. Rept. 565, 89th Cong., 1st Sess.

For recent additions, see Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts, 1966; New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966; Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950 as amended by ch. 151, Laws 1966; Rhode Island Sales and Use Tax Act, ch. 18 and 19 of Title 44 of the General Laws of Rhode Island, 1956, as amended by H.B. 1730, Laws 1966.

[4] See pp. 26-27, n. 15, below.

firms except as they can sustain the burden of acting as tax collectors for States and municipalities throughout the nation.

Although the exact question has not been decided, the decisions of this Court plainly indicate that an out-of-State firm cannot be required to collect a use tax on interstate sales unless it has some property or representatives within the taxing State. We discuss the relevant cases in the first part of our argument. See pp. 15-21 below. The decision below is not only inconsistent with those precedents but, as we will show next, it violates the fundamental principles of the federal system by asserting unfair extraterritorial jurisdiction and unduly burdening interstate commerce.[8] See pp. 21-39 below. Finally, we show that the settled practice is not to collect use taxes where the seller does only a mail-order business; that most tax administrators have refrained from demanding collection; and that the congressional committee charged with the task has recommended legislation barring extension of extraterri-

---

[8] In the present case it is unnecessary to take a position as to whether, as an original matter, the constitutionality of the Illinois statute would be analyzed better in terms of the commerce clause or the due process clause of the Fourteenth Amendment. We cast our argument primarily in terms of the Fourteenth Amendment because the Court has followed that analysis in previous cases. However, two further points should be noted. First, this is not merely a case of invoking the concept of due process as a bar to State taxation of those beyond its borders. A true question of procedural due process is also involved because Illinois has attempted to enforce the challenged substantive obligation by asserting *in personam* jurisdiction over a firm which was not served personally and, which has never been within the jurisdiction. See p. 12, n. 2 above. In all previous cases there was either personal service or an attachment of property. Second, for reasons stated at pp. 21-39 below, analysis in terms of the commerce clause leads to the same result as analysis in terms of nexus and due process. Compare Justice Black concurring in *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 618-622. It is difficult to think of any transaction that is more purely interstate commerce than the mail order sales involved in this controversy.

torial liability to mail-order houses having no business location within the jurisdiction. See pp. 39-44 below.

A. *The established rule is that a State may not impose extraterritorial liability to collect use taxes upon sellers having neither property nor representatives within the jurisdiction.*

This Court's decisions draw a sharp line between mail-order firms which have outlets, property, salesmen or representatives within a State and exclusively out-of-State firms which merely send advertising and merchandise into a jurisdiction by mail or common carrier as part of a general interstate distribution. The former have such contacts with the State as to give it power to require them to collect local use taxes on sales to mail-order customers. Under past decisions the latter cannot constitutionally be subjected to use tax liabilities. In each of the cases sustaining the imposition of liability, the Court stressed the presence of either local outlets or local representatives. The leading opinion acknowledged that the obligation to collect a local use tax could not constitutionally be imposed upon an exclusively mail-order business.[6] Where there was neither a local outlet nor any other local representative but interstate deliveries were made in response to interstate advertising, the Court held that the imposition of the liability would violate the Fourteenth Amendment.[7] The Court has never suggested that the presence of solicitors or other local representatives is immaterial.

(a) *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, upheld a California statute imposing upon an out-of-State seller liability to collect a local use tax in connection with the sale and shipment of goods to local residents where

[6] *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359.
[7] *Miller Bros.* v. *Maryland*, 347 U.S. 340.

the interstate sales were arranged by agents and subagents working in California. The opinion did not discuss the State's power to require the seller to collect the tax, probably because any conceivable doubt upon the point was answered by the continuous presence of the seller's local agents.

(b) In *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, the Court held that a State may require an out-of-State mail-order concern to collect the use tax levied upon its local customers where the mail-order concern also maintains local retail stores, doing a related business, which enjoy the protection and services of the taxing State. The opinion stressed the importance of the seller's local business done through local retail outlets. "Since Iowa has extended it that privilege, Iowa can exact this burden [of collecting the use tax] as a price of enjoying the full benefits flowing from its Iowa business" (312 U.S. at 364). The Court distinguished "out-of-State mail order houses" on the ground that they "are not receiving benefits from Iowa for which it has the power to exact a price" (312 U.S. at 365). Thus, the *Sears, Roebuck* case plainly implies that the mere solicitation of business from outside a State, followed by interstate delivery to local customers, is not a sufficient nexus.

(c) The opinion in a companion case, *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, mentioned local advertising as an element giving the State jurisdiction. The court below erroneously supposed that this was an indication that any regular advertising within the State would provide the necessary nexus. Similarly, appellee argued, in its Motion to Dismiss (p. 3), that "there was an express holding that . . . solicitation by advertising in the state was the equivalent to solicitation by local agents." Both the court below and appellee misread the opinion. The opinion does not speak of "advertising" generally. It speaks of "*local*

advertisements"[8] to describe the advertising by Montgomery Ward's *local* retail outlets.

> It was stipulated that "advertisements have been caused to be printed *by the retail stores* of petitioner (Montgomery Ward and Co.) in the State of Iowa. . . ." [Emphasis supplied.]

The Court continued—[9]

> The fact that such solicitation was done through *local advertisements* rather than directly by *local agents* as in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. [Emphasis supplied.]

Thus, the holding was only that *local advertising* of the mail-order business by the local retail stores was not to be distinguished from face to face solicitation *by local agents*. Advertising of the mail-order business by the local retail stores linked the stores, which were the nexus giving jurisdiction, to the mail-order business, which felt the incidence of the obligation. This is a far cry from the claim that sending catalogs into a State by the United States mail gives that State and every other jurisdiction into which the catalogs are mailed the power to require the out-of-State seller to collect taxes for States in which it has neither outlets nor representatives.

(d) In *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335, the retailer sent a sales force into the jurisdiction. The Court again held that *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, was dispositive, because the interstate business was solicited by local agents.

---

[8] 312 U.S. at 376.

[9] *Ibid.* One intervening sentence is omitted.

> The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine from without a state as in the *Gallagher* case, compared with the apparently simpler needs for soliciting here.

Manifestly the Court was talking about the local solicitation, which it described in the opinion, not about out-of-State use of the United States mails.

(e) *Miller Bros.* v. *Maryland*, 347 U.S. 340, rejects the argument that jurisdiction to compel an out-of-State firm to collect a local use tax can be predicated upon regular, continuous advertising through interstate media without local stores or local solicitors. Miller's Delaware furniture store advertised its wares in newspapers and over radio stations which consistently reached the neighboring interstate market. As a result of the advertising the store regularly sold furniture to Maryland customers for use in Maryland. It made regular deliveries in Maryland in its own truck driven by its own employees. The Court held that the Delaware vendor could not constitutionally be required to collect the Maryland use tax on these interstate sales.

Miller Bros. v. *Maryland* should govern the present case. Miller's effort to develop the Maryland market was at least as intensive as appellant's advertising in Illinois. Miller advertised its wares in Maryland almost daily, through Delaware newspapers circulating in Maryland. Appellant uses no newspaper advertising that reaches Illinois. Miller sent out regular mailings addressed to Maryland customers four times a year. Appellant mails its regular catalogs twice a year and sends out intermediate sales books and flyers. Neither Miller nor appellant beamed any advertising specifically at the taxing State. On all these points the cases are indistinguishable.

Miller had more contact with Maryland than appellant has with Illinois. Miller regularly sent its own truck and driver into Maryland to make deliveries, and Maryland levied on the truck to enforce payment of the tax. The dissenting justices thought that this contact was sufficient, in conjunction with the advertising, to confer jurisdiction. Appellant sends no one to Illinois; it ships its merchandise by mail or common carrier. Consequently, the view expressed by the dissenting justices in *Miller Bros.* v. *Maryland* is entirely consistent with our position in the present case.[10]

The other differences are immaterial. Miller's customers made an interstate journey whereas appellant's purchasers transmit their orders by interstate mail. The difference can hardly help Illinois. In this context, interstate travel cannot be distinguished from interstate communication. In both cases the sales were completed outside the State and the goods were delivered through the channels of interstate commerce. The volume of business here is larger than in *Miller*, but size alone cannot be the criterion and the stipulation of facts in *Miller* indicates that its business with Maryland customers was both regular and

---

[10] The view of the dissenting justices—that the regular household deliveries were sufficient contact to sustain the duty to collect the use tax—is incorporated into a bill introduced by Congressman Willis of Louisiana as chairman of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, on the basis of an unusually careful and detailed study of the consequences of State sales and use taxes. H.R. 16491, 89th Cong., 2d Sess. Sec. 101(2), 511(a), 514. The bill also takes the position we advocate here with respect to mail-order sales by out-of-State sellers; it would expressly bar a State from requiring the collection of use taxes upon mail-order sales by firms having no business location within the jurisdiction and making deliveries only by mail or common carrier. In September 1966 the House Committee on the Judiciary reported the bill favorably, recommending that it be enacted without amendment. Only one of the thirty-five members of the committee objected. H. Rept. 2013, 89th Cong., 2d Sess. (1966).

substantial. Indeed, if the decision below is not reversed, thousands of mail-order firms much smaller than Miller will be subjected to multi-State obligations. H. Rept. 565, 89th Cong., 1st Sess. 770. In Miller some of the goods were picked up by customers at the out-of-State store, but that was not true of the greater part—66 percent—of the business. Miller's deliveries were just as continuous and just as regular as appellant's shipments.

Miller Bros. v. *Maryland* necessarily holds, therefore, that the regular solicitation of orders by the interstate dissemination of general advertising, followed by delivery to local customers, is not sufficient nexus to give a State jurisdiction to require the out-of-State vendor to collect the State's tax on the in-State customers' subsequent use of the goods. So read, the decision gives effect to the earlier statement in *Sears, Roebuck*, that mail-order houses could not be required to collect use taxes when they had neither outlets nor solicitors within the taxing State. Those rulings cover the present case.

(f) The latest precedent reinforces this conclusion. In *Scripto, Inc.* v. *Carson*, 362 U.S. 207, the question was whether Florida had jurisdiction to require collection of a local use tax from an out-of-State vendor because of the physical presence of salesmen carrying on the vendor's business within the State. After noting that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," the Court held (p. 211)—

> We believe that such a nexus is present here. . . . as Florida points out, appellant has 10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting order from that State to Atlanta for shipment of the ordered goods.

And the very first point made by Justice Clark in distinguishing *Miller Bros.* v. *Maryland* was that "Miller had no solicitors in Maryland."

The short of the matter, therefore, is that the Court has consistently drawn a line between locally soliciting customers by retail stores, or salesmen however denominated, on the one hand, and, on the other hand, merely sending advertising, such as catalogs, into interstate markets. In the former case the Court has sustained but in the latter situation it has invalidated efforts to require the seller to collect and pay over the buyers' tax. That line of distinction requires reversal of the judgment below.

B. *The rule that the States may not impose upon out-of-State sellers extraterritorial liability to collect local use taxes is sound in principle*

The line of distinction fixed by the foregoing decisions rests upon principles essential to the overriding national policy of preserving open interstate markets. Mail-order sales have long been significant factors in opening the minds and raising the living standards of millions of Americans who lack other access to the kinds of merchandise available in urban stores. Catalog houses offer consumers the economies of volume distribution, assurance of fixed, uniform prices, and also more varied merchandise than most local stores can afford to carry. For years their semiannual publications have stirred the imagination of both adults and children. Mail-order sales also support the development of thousands of small, independent enterprises—often based upon local specialties, such as Vermont maple sugars, New Orleans pralines, and the beautiful Sierra Club publications—where their wares could never find a national market, through other channels of distribution. Interstate traders must pay for the protection which they

receive from a State or local government, but the constitution leaves no room for the States to obstruct interstate markets by imposing discriminatory or extraterritorial obligations upon out-of-State firms having no real connection with the jurisdiction. Since appellant has neither property nor representatives in Illinois, the onerous discriminatory and extraterritorial burdens imposed by the Illinois statute cannot be sustained by pointing to appellant's enjoyment of benefits or opportunities within the jurisdiction. This is also true of other out-of-State mail-order sellers. Accordingly, the sending of advertising or goods into a State by mail or common carrier is not alone a sufficient nexus to permit the State to make an out-of-State business liable for collecting a local tax.

Four converging considerations support this proposition.

1. *The obligation to collect use taxes wherever their customers were located would impose cumulative, and therefore discriminatory, burdens upon out-of-State mail-order businesses.*

In the present case the Court has the benefit of a careful congressional investigation of the actual operation of sales and use tax laws as applied to interstate commerce. The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. The reports most relevant to the present case are H.Rept. 565 and 952, 89th Cong., 1st Sess. (1965).[11]

[11] Since the pagination is consecutive through the several volumes despite the different document numbers, we hereafter cite all the volumes as "Report."

The study resulted from mounting concern about the steady expansion of State taxation of interstate transactions. Following the decision in *Northwestern Portland Cement Co. v. Minnesota*, 358 U.S. 450, Congress enacted legislation forbidding a State or political subdivi-

The typical mail order firm sends advertising and goods from a single establishment into a regional or national market. If one State, such as Illinois, can require the firm to collect taxes merely because some of its customers reside in Illinois, then every other State in which it has customers may also impose upon the same firm the burdens of a tax collector. For a firm whose advertising ran nationwide this would mean acting as tax collector for an immediate minimum of twenty-one States and ultimately for forty-two or even fifty.[12]

The inevitable result is serious discrimination against interstate commerce. A retail store normally deals with one set of customers under the laws of a single State. A mail-order house receives orders from many jurisdictions. The latter often faces insuperable practical obstacles in the collection of the tax from a distant customer. See pp.

---

sion to tax income derived from interstate commerce by a business whose only activities within the State were the solicitation of orders subject to approval or rejection outside the State to be filled by interstate delivery. The same statute authorized the House Committee on the Judiciary and the Senate Committee on Finance to make full study of State taxation upon income derived from activities in furtherance of interstate commerce. Act of September 14, 1959, 73 Stat. 555 (1959). After *Scripto, Inc.* v. *Carson*, 362 U.S. 207, the authorization was expanded to include study of the impact of State and local sales and use taxes. Act of April 7, 1961, 75 Stat. 41 (1961). The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee of the Judiciary of the House of Representatives. Hearings were held during the 87th Congress. Reports were published during the 88th and 89th Congresses. The reports most relevant to the present case are H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965). Following the study the full Judiciary Committee recommended that the States should be prevented from requiring the seller to collect a use tax upon an interstate sale unless it had a business location within the taxing jurisdiction or made regular household deliveries there otherwise than by mail or common carrier. See H. Rept. 2013 favorably reporting with amendment H.R. 16491, 89th Cong., 2d Sess.

[12] Forty-two States have sales and use taxes. Twenty-one already have some form of catalog or advertising provision. See p. 13, n. 3 above.

28, 59-60 below. Apart from this, if the State laws were uniform and the States would accept one set of records, the cumulative burden might be no more than proportionate to the volume of business. The difficulty results from the variations and inconsistencies in State laws and record-keeping requirements. Congressman Willis, chairman of the Special Subcommittee, graphically described the plight of the typical mail-order enterprise under the theory now espoused by Illinois (112 Cong. Rec. (Sept. 30, 1966) A-5055):

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.

The Report discloses—

> in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. [*Report* 771.]
>
> * * *
>
> The interstate seller of consumer goods . . . has the same costs as a local firm selling the same types of items *plus the added costs of complying with the laws of many States at once.* [*Report* 812, emphasis supplied.]

Discrimination against the interstate trader would be the inevitable result of allowing States to impose the essentially extraterritorial liability asserted by Illinois. State sales tax laws are and always will be divergent, except as Congress might allow the imposition of an obligation condi-

tional upon adherence to a uniform system. See, *e.g.*, *Report* 1177-1187. The central vice of extraterritorial obligations is that they invariably turn into multiplicitous burdens imposed by many States. The same nexus asserted by Illinois can be claimed by every other jurisdiction in which appellant's mail-order customers are located. The resulting discrimination against interstate commerce is no less relevant because it appears in the actual operation of State laws rather than on the face of the statute. As the Chief Justice observed in *Halliburton Oil Well Co.* v. *Reilly*, 373 U.S. 64, 69—

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

See, also, *Nippert* v. *Richmond*, 327 U.S. 416.[13]

The variations in State laws would make the obligation more onerous for interstate mail-order firms than local

---

[13] In *Nippert* v. *Richmond*, supra, a flat municipal license fee levied on all persons "engaged in business as solicitors" was held invalid as applied to the itinerant solicitors of out-of-State firms because the cumulative burden of flat annual taxes laid in succession upon the same itinerant solicitor as he passed from town to town would weigh more heavily upon the out-of-State company than upon a local concern operating within a limited area. ". . . the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between these two classes of commerce, generally speaking, impossible" (Id. at 432). Similarly, in the present case, the cumulative effect of a succession of obligations to act as use tax collector for fifteen, thirty or all fifty States, plus many municipalities, would inevitably bear more heavily upon interstate commerce than upon the local merchants who deal only with a single jurisdiction. The very difference between multistate and local trade taken in conjunction with the inherent characteristics of an extraterritorial obligation to act as tax collector makes it impossible, generally speaking, to achieve equality of application.

merchants at each step in the process of attempting to collect the tax.[14]

Variations between the States in the rate of tax increase the burden of computation. The mail-order seller would have to make separate computations on each order according to the customer's residence, for eight different rates are now current among the several States: 2, 2 1/4, 2 1/2, 3, 3 1/2, 4, 4.2 and 5 percent.[15] At best, the requirement would introduce an additional clerical operation into a business the success of which depends upon processing sales simply and cheaply. As the Report noted (p. 771), "sizable firms with broad lines may have to break down their order processing in order to enable clerks to specialize in groups of States."

Exemptions present an insuperable problem. Hardly

---

[14] In Appendix B, pp. 55-69 below, we give a more detailed description of the effects of imposing an obligation to collect use taxes upon out-of-State mail-order firms.

[15] *Two percent*: Ind. Ann. Stat. § 64-2656 (Supp. 1966); Iowa Code Ann. § 423.2 (1949); La. Rev. Stat. § 47.302 (1952); Nev. Rev. Stat. § 372.185 (1963); N. Y. Tax Law § 1110; Okla. Stat. Ann. tit.68 § 1402 (1966); Tex. Tax-Gen. art. 20.03 (Supp. 1966); Va. Retail Sales and Use Tax, § 58-441.5 (4 CCH Sales Tax Rep. paras 73.129-73.132 (March 29, 1966).

Two and one quarter percent: N. D. Cent. Code Ann. § 57-40.02. (Supp. 1963).

Two and one half percent: Wyo. Stat. Ann. § 39-311 (Supp. (1965).

Three percent: Ariz. Rev. Stat. Ann. §§ 42-1408 [2%] (1956), 42-1361 [1%] (Supp. 1966); Ark. Stat. Ann. § 84-3105 (1960); Cal. Rev. & Tax Ann. Code § 6201; Colo. Rev. Stat. Ann. § 138-5-6, as amended by H.B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para 26-055 (July 8, 1965)); D. C. Code Ann. § 47-2702 (Supp. 1966); Fla. Stat. Ann. § 212.05 (Supp. 1965); Ga. Code Ann. § 92-3402a (1961); Idaho Code Ann. § 63-3621 (Supp. 1965); Kan. Stat. Ann. § 79-3703 (Supp. 1965); Ky. Rev. Stat. Ann. § 139.310 (Baldwin 1963); Md. Ann. Code art 81, § 373 (1965); Mass. Retail Sales Tax § 2(2), 3 CCH Sales Tax Rep. para. 43-208 (March 15, 1966); Mo. Ann. Stat. §§ 144.020, 144.610; N. M. Stat. Ann. § 72-17-3 (Supp. 1965); N. C. Gen. Stat. § 105-164.6 (1965); Ohio Rev. Code Ann. § 5741.02 (Page 1966); S. C. Code Ann. § 65-

two States provide identical exemptions.[16] Checking the exemptions allowed by each State against the individual items in each order received from one of its residents would be ruinously expensive. The tax might be collected and paid without regard to any exemptions, unless claimed by the customer, but since customers are usually ill-informed, the practical effect is to put those who buy in interstate commerce at a disadvantage in comparison with those who purchase at a local store.

The burden of record-keeping would be multiplied. Separate sales records would have to be kept for every State in which the firm had customers. Twenty-eight sales-tax States require monthly returns; fifteen require returns quarterly.[17]

To undergo multiple audits for different States would be prohibitively expensive, yet State laws require sellers

---

1421 (1962); S. D. Code § 57.4303 (Supp. 1960); Tenn. Code Ann. § 67-3003 (Supp. 1966); Utah Code Ann. § 59-16-3 (Supp. 1965); W. Va. Code Ann. § 999(30b) (Supp. 1965); Wis. Stat. Ann. § 77.53 (Supp. 1966).

Three and one half percent: Conn. Gen. Stat. Ann. § 12-411 (Supp. 1966); Ill. Ann. Stat. ch. 120, § 439.3 (Smith-Hurd Supp. 1966); Miss. Code Ann. §§ 10108, 10146-03 (Supp. 1964).

Four percent: Ala. Code tit. 51, § 788 (Supp. 1965); Hawaii Use Tax § 119-2(c), 2 CCH Sales Tax Rep. para 32-418 (April 28, 1966); Me. Rev. Stat. Ann. tit. 36, § 1861 (Supp. 1966); Mich. Stat. Ann. § 7.555(3) (Supp. 1965); R. I. Gen. Laws Ann. § 44-18-20 (Supp. 1965).

Four and two-tenths percent: Wash. Rev. Code Ann. § 82.12.020 (Supp. 1966).

Five percent: Pa. Stat. Ann. tit. 72, § 3403-202 (1964).

[16] For illustrations see Appendix B, pp. 63-65 below.

[17] Monthly returns are required by Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington and Wyoming.

Quarterly returns are required by Alabama, California, Connecticut, Idaho, Iowa, Missouri, Nevada, New York, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia and Wisconsin. See 1 CCH Sales Tax Rep. par. 301.

either to deliver their original books of account to State authorities for audit or else to pay the expense of an office audit, which usually includes the travel, living expenses and fees of two auditors. Basing its conclusion upon the firms of substantial size with respect to which it made a cost study, the Special Subcommittee concluded (*Report* 759):

> Should all sales tax States conduct as much field auditing as does, for example, California, many companies would undergo several audits per year. No matter how accommodating the auditors might be, the resulting situation would entail considerable interference with the personnel and procedures of multistate businesses.

For smaller enterprises, the time, trouble and expense could well be ruinous.

The mail-order seller, unlike the local merchant, bears the burden of paying much of the tax ostensibly levied on his customers. Testimony before the Subcommittee put individual rates of non-collection at 30, 42, 57 and 75 percent. *Report* 771. Appellant is unable to collect the tax on 40 percent of its mail-order sales in the three States in which it has retail stores. See Appendix B, pp. 59-60 below. The resulting tax burden cuts heavily into the margin of profit. Where the tax rate is 4 percent, even a non-collection rate as low as 25 percent would mean that the out-of-State seller was absorbing the equivalent of a one percent tax upon gross sales to that jurisdiction. If the margin of profit before taxes were 4 percent of sales —a pretty good margin for a business depending upon high volume and rapid turnover—one quarter of the gross profit would be dissipated merely by inability to collect the buyer's tax, quite apart from the other costs of acting as tax collector. Where a company was less successful,

the tax burden could well turn what would otherwise be a profit into a loss.

The theory of the decision below would also render a mail-order house with only a single location liable to collect and pay over use taxes for literally thousands of counties, municipalities, and even school and police districts, which directed out-of-State vendors to collect their local use taxes. The number of sales tax localities was 2,329 in 1964. A third of them also imposed compensating use taxes. *Report* 841-845. On top of all the other difficulties of dealing with hundreds of jurisdictions, there would be added the problems resulting from the simple fact that the post office address furnished by a customer does not accurately identify the municipality, county or school (or police) district in which he lives. The only possible conclusion is fairly stated in the Subcommittee's *Report* (p. 882):

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential out-of-State registrants, the record-keeping task of multi-state sellers would be clearly intolerable.

Local taxes aside, it is difficult to epitomize with accuracy the net effect of imposing these discriminatory burdens upon out-of-State mail order businesses under Illinois' theory of nexus. The burden is manifestly substantial. The Subcommittee recommended eliminating—

> the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting the tax. [*Report* 884.]

Beyond this, the degree of the burden depends upon the size and character of the individual business. The few, very large mail-order houses with nationwide outlets have already adapted themselves to seller collection without ruinous cost. The Report observes that, for the major catalog houses, "the responsibility to collect sales taxes causes clerical work and some losses" but that the "problems are small when compared to similar problems handled in the regular course of business." *Report* 772. Later, the Subcommittee observed that the compliance costs were "supportable" by most companies then collecting use taxes outside their home States—chiefly industrial retailers and large catalog houses maintaining nationwide retail outlets. But the Subcommittee added (*Report* 812):

> An exception must be made to this conclusion for the interstate seller in a low volume, low unit price business—typically the small mail-order business. . . . No small mail-order house has been found which collected sales tax for more than one or two States; however, the study of cost relationships in other forms of business strongly indicates caution for cost reasons alone toward extension of the collection responsibilities of this special form of interstate seller.

The major catalog houses which could support the compliance costs comprise "only a tiny minority of all mail-order businesses." *Report* 770. Most of them are already collecting use taxes for the States where their customers reside because of their local operation of retail stores. Efforts to extend jurisdiction to wholly out-of-State firms, therefore, bear primarily upon the very much larger number of very much smaller businesses.[18]

[18] "It must be borne in mind, therefore, that efforts to subject mail-order sales to sales taxation involve not only the few major houses but also a large number of much smaller businesses." *Report* 770.

The Illinois statute is not unconstitutional *solely* because of the unequal financial burden which it puts upon interstate commerce because of "the added costs of complying with the laws of many States at once." *Report* 812. That contention is foreclosed by the decisions holding that a company's mail-order business may be subjected to those costs when it gains the local advantage of the company's use of local solicitors or local retail outlets.[19] The burden is nonetheless important here. In deciding whether there is sufficient "nexus" to support all the States where the customers reside in requiring an out-of-State seller to collect their taxes, the resulting burden must be weighed with the extent of the seller's contacts, if any, with the taxing States. A contact that will support a trivial or slight obligation will not sustain one which is so onerous or so discriminatory as to clog interstate markets. So far as due process is concerned, the controlling question is whether the tax obligation has a proper relation to benefits of local government conferred upon the seller by the taxing States. See *Standard Oil Co. v. Peck*, 342 U.S. 382 and cases cited pp. 32-33 below. From the standpoint of the commerce clause, the burdens become proportionately more serious as the contact with the taxing State diminishes, both because the net balance is more adverse to freedom of the market and because one of the fundamental vices in essentially extraterritorial obligations is that they obstruct the interstate movement of persons, communications and goods. In this respect, the functions of the due process and commerce clauses are overlapping. *Hood & Sons, Inc*, v. *Du Mond*, 336 U.S. 525, 556 (Black, J., dissenting); Brown, *The Open Economy*, 67 Yale L.J. 219, 237 (1958); *Developments in the Law—Federal Limitations on State*

[19] *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373.

Taxation of Interstate Business, 75 Harv. L. Rev. 953, 962 (1962).

2. *Out-of-State mail-order firms receive no benefits from the taxing State.*

Appellant has no property in Illinois to enjoy fire or police protection. It has no salesmen or deliverymen there, using the highways or enjoying the benefits of local government. It carries on no activities in Illinois, for delivering the mails and operating railroads and trucks lines are no part of appellant's business. Nor does appellant create, in Illinois, any of the community problems for the solution of which modern State and local governments must levy taxes. So far as Illinois is concerned, appellant's property, personnel and entire organization are confined to Missouri.[20] In Missouri it enjoys the benefits of local government and bears a share of the cost. Other out-of-State mail-order firms typically occupy the same position. In effect, Illinois and the States which will follow if Illinois succeeds are seeking to impose multiplicitous obligations upon out-of-State firms that enjoy none of the ordinary benefits of government within their jurisdictions.

Since appellant receives none of the benefits of Illinois government, Illinois may not require it to collect or pay taxes. Enjoyment of the benefits of a State government has long been held to be the principal source of its power to tax. In *Lawrence* v. *State Tax Comm.*, 286 U.S. 276, 279 Justice Stone spoke of—

> the most plenary of sovereign powers—that to raise revenue to defray the expenses of government and to

[20] Appellant has retail stores in Alabama, Mississippi and Kansas. It pays use taxes on sales to those jurisdictions. Those local outlets have no connection with its transactions with customers in Illinois.

> distribute its burdens equably among those who enjoy its benefits.

In *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444, in upholding the power of Wisconsin to tax the declaration of dividends by a foreign corporation licensed to do business in Wisconsin, the Court said—

> The simple but controlling question is whether the state has given anything for which it can ask return.

See, also, *Northwestern Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 465 (income tax); *Ott* v. *Mississippi Barge Line Co.*, 336 U.S. 169, 174 (apportionment of property tax); *Standard Oil Company* v. *Peck*, 342 U.S. 382, 385 (apportionment of property tax).

This is also the test heretofore applied to the obligation to collect use taxes upon interstate sales. In *Nelson* v. *Montgomery Ward*, 312 U.S. 373, 375 the Court sustained Iowa's imposing the obligation upon a firm with local outlets and employees, because "the burden which Iowa has exacted [is the] price of enjoying the full benefits flowing from its aggregate Iowa business." Justice Rutledge's concurring opinion in the *General Trading* case took the view that jurisdiction depends upon "tax benefits conferred in general police protection and otherwise." The same theme is expressed in the opinion of the Court. *General Trading Co.* v. *Tax Comm.*, 322 U.S. 335, 338, 356-357. Conversely, in indicating that exclusively out-of-State mail-order businesses need not collect the Iowa use tax upon Iowa sales, the Court pointed out that "they are not receiving benefits from Iowa for which it has the power to exact a price." *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 365.

The opportunities for "exploitation of the consumer market," stressed by appellee and the court below, are not benefits conferred by the taxing State. Illinois has no power to bar from her territory either appellant's catalogs or the merchandise shipped to appellant's customers. Appellant's exploitation consists wholly of activities outside the State: (a) depositing catalogs in the United States mails, in Missouri, addressed to prospective purchasers in many States, (b) receiving, in Missouri, money and orders for goods mailed from Illinois and (c) delivering to the United States mails and common carriers, in Missouri, merchandise addressed to customers in Illinois and all other States. The activities of the postal authorities and common carriers in Illinois cannot be said to be appellant's activities. The postal authorities and the common carriers, not the appellant, enjoy any opportunities or advantages that State government confers upon them. *A fortiori* appellant is not the one who enjoys the benefits, opportunities or advantages that the State government confers upon the Illinois purchasers. The only conceivable "benefit" which appellant derives from the government of Illinois is that the ability of Illinois residents to use merchandise under the protection of the State government, after they have bought it, may perhaps give appellant a better market for its goods. Such a benefit is incident to every business transaction between citizens of different States. To recognize it as a basis for taxation would enable every State to reach beyond its borders to tax the other party to any transaction with one of its citizens. A State might then reach out and tax transactions in other States merely because the property was later to be brought into the jurisdiction. That argument was flatly rejected in *American Oil Co.* v. *Neill*, 380 U.S. 451, as destructive of the federal system.

3. Out-of-State mail-order firms have no opportunity to participate in self-government in the jurisdiction imposing the tax.

It is a form of taxation without representation to make an out-of-State firm liable for the collection and payment of use taxes in several States as the price of merely sending catalogs and merchandise into interstate markets. A State must concern itself with the welfare of businesses carried on within its borders. They are part of the common wealth even when owned by non-residents. If they are injured, there is loss to the body politic. Their local operators, managers, and representatives present in the State may vote and otherwise participate in the political process; they may make their weight felt by State officials. Thus, the normal, political restraints will be operative in considering such legislation. There are no such restraints, however, in relation to an out-of-State firm having neither property nor representatives within the jurisdiction. The State or subdivision asserting extraterritorial power feels no concern for the burdens imposed upon out-of-State businesses. The costs will be borne outside its borders. The persons affected by the burdens are not heard in the democratic process. Consequently, there is temptation to raise money at their expense, heedless of the damage.

It is a function of the due process and commerce clauses to bar such attempts to enrich the people of one State at the expense of the people of another. "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the State legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." (*South Carolina Highway Dept.* v. *Barnwell*

Bros., 303 U.S. 177, 185, n.2) See, also, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46, n.2. "Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation" (*Nippert* v. *Richmond*, 327 U.S. 416, 434). ". . . the real victims of the statute are deprived of the opportunity to exert political pressure upon the . . . legislature in order to obtain a change in policy" (*Edwards* v. *California*, 314 U.S. 160, 174). Although the cases cited involved the application of the commerce clause, the underlying principle is equally important in determining whether there is sufficient nexus to support tax obligations. *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 957, 962 (1962).

The present controversy exemplifies the constitutional defect mentioned in the last cited cases. The voices and votes of out-of-State mail-order businesses will not be heard in the States where they have only customers, and their interests are of scant concern to those States because any damage is done in another jurisdiction. Gaining no benefits and having no voice or representation within the jurisdiction, they cannot fairly be taxed.

The exclusively out-of-State business differs in these two essential respects from the mail-order seller which maintains stores or salesmen within the jurisdiction. Businesses with local retail outlets obviously derive benefits from the local government. A seller with a local sales force enjoys much the same protection. His salesmen use the State's highways, enjoy its police protection and carry on their business activities within the sphere of local concern substantially as if they were doing local rather than interstate business. In return for these benefits the seller may fairly be expected to carry a share of the cost of government. An exclusively mail-order business, on the other hand,

creates no local problems and receives none of the local benefits supporting tax obligations. Similarly, the concern with a local establishment or local sales force may exert influence in local political processes. Its activities and expenditures are part of the local common wealth with which the government must be concerned. Its supervisors and salesmen may live and work in the jurisdiction. By definition it has a number of representatives within the State who, if the management wishes, can deal with the problems of local taxation. Although one can posit cases where the presence of local representatives is scarcely more contact than that of the exclusively out-of-State seller, the situation of most businesses with a local sales force is much closer to that of the firm with a local establishment. Taking those businesses as a group their situation is radically different from that of mail-order houses with neither local representatives nor local outlets.

4. *Local merchants would suffer no significant competitive disadvantage from failure of out-of-State mail order firms to collect the local use tax.*

As a matter of law, the Constitution bars a State from enforcing measures aimed at equalizing the costs of in-State and out-of-State businesses. *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511. The chief occasion of the adoption of the Constitution was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII.

In fact, the argument that inability to require out-of-State sellers to collect use taxes would put local merchants at a competitive disadvantage is greatly exaggerated. Any differential between tax-free sales and sales subject to the use tax may be reduced or eliminated by the difference

in the other tax burdens imposed by the seller's home State. Although it noted that out-of-State mail-order houses offering goods available in local stores may have some tax advantage, the Special Subcommittee observed—

> All in all, it would seem that the majority of specialized mail-order operations are such that there is little competitive reason for requiring them to collect sales tax. When this is coupled with the problems of collecting the tax which confront all of these businesses that sell for cash, it becomes difficult to find any justification for a State's imposing its collection requirements on companies of this kind.

Thus, the Subcommittee concluded, with respect to specialized mail order operations, that there is "little competitive reason for requiring them to collect sales tax," and that, with respect to all out-of-State mail-order firms, it is difficult to find "any justification for a State's imposing its collection requirements on companies of this kind." *Report* 774. Its net conclusion was that limiting liability for the collection of use taxes to sellers having a permanent place of business within the taxing State would leave "little room for a flight of purchases with significant revenue consequences." *Report* 884. *A fortiori*, rejection of Illinois' attempt to tax wholly out-of-State mail-order businesses does not leave local retailers at a significant competitive disadvantage.

In summary, then, the decision below violates basic constitutional principles. A mail-order sale is the purest form of interstate commerce. There can be no transaction with Illinois residents in which the seller has less contact with Illinois than upon a mail-order sale by an out-of-State firm. The only remaining step would be for Illinois to tax all interstate contact with her people. The Illinois statute

imposes a heavy and discriminatory burden upon interstate commerce because the extraterritorial character of the obligation inevitably means that many other States will impose the same kind of duty upon the same mail-order firm. Such firms gain no local benefits in return for which a local tax may fairly be imposed. The out-of-State mail-order houses have no remedy in internal political processes. The extraterritorial obligation is not needed to protect local merchants or State revenue. On principle then, as well as on precedent, the decision below should be reversed.

C. The Settled Limitations Upon Jurisdiction to Require Extraterritorial Collection of a Use Tax Should Not Be Disturbed Without Congressional Action.

Even if the point were otherwise doubtful, the Court should not now disturb the distinction between (a) businesses with local representatives or related local outlets, which may be subjected to liability to collect use taxes, and (b) exclusively out-of-State businesses, which are immune. This conclusion is impelled by four considerations.

First, the line of distinction is drawn by the decisions of this Court. See pp. 15-21 above.

Second, the distinction is firmly embedded in business practice and use tax administration. After studying the 4,203 firms covered by the 1963 Census of Business, the Special Subcommittee found that the large catalog houses which maintain nationwide retail outlets pay local sales or use taxes because the outlets confer jurisdiction, while smaller firms pay sales or use taxes in their home States and if, like appellant, they own a few retail outlets, they also pay the tax in those jurisdictions. The Subcommittee also found, however, that among this group (*Report* 772)—

> Collection or payment of sales tax in a state where a firm does only mail-order business is virtually unknown.

Some $1.3 billion in mail-order sales and all but a handful of the 4,206 firms covered by the 1963 Census of Business fall in this category.

Out-of-State department stores which generate mail order sales by newspaper advertisements or seasonal catalogs (*e.g.* Macy's, Harvard Cooperative Society and F.A.O. Schwarz) do not collect use taxes upon mail-order sales in interstate markets. With respect to them the Subcommittee found (*Report* 772)—

> Tax is charged on these sales only in States where the firm has a retail outlet . . .

The remaining mail order sales are made by firms selling specialty products, like Vermont maple syrup, Wisconsin cheeses, or the books of the Sierra Club. In an effort to discover the practice of these small enterprises the Subcommittee studied 815 mail-order advertisements in periodicals having national circulation. Only 20 of the 815 advertisements even mentioned a sales tax. Not even one advertisement stated the rate for more than one State; presumably the one tax mentioned in the 20 out of 815 advertisements was for the home jurisdiction. (*Report* 773). The inescapable inference is that these firms, too, have not been acting as tax collectors for other States.

Sales tax administrators, although anxious to extend sources of revenue, have largely accepted the distinction between firms with and without local representatives. "Where the seller's only contact with the State is advertising, most States indicated that they do not in practice assert liability; less than one-fourth of the sales tax

States appear to rely on one form or another of this contact." (*Report* 630). Most of the assertions of liability appear to be only nominal. So far as we can discover only two States—Alabama and Illinois—have actively challenged the accepted rule. In Alabama the Supreme Court rejected the challenge on the ground that the constitutional decisions of this Court preclude requiring collection of a local use tax by an out-of-State business. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 S.2d 91 (1965). If the decision below is affirmed, there will undoubtedly be wider efforts to require out-of-State collections. In terms of present practice, however, collection and efforts to enforce collection are virtually unknown.

Third, overturning the foregoing practice will impose liability for uncollected use taxes for past years upon thousands of out-of-State businesses, large and small, even though none of them made collections from their mail-order customers. They would be required to defend collection suits brought in many different localities, often far from their only offices, employees and records, in States in which they never did business and where the only service of process was upon a State official and notice by registered mail. The judgment against appellant is of this character. Although these facts may not make out a technical case of retroactive liability,[21] they furnish strong

[21] We submit that the technical case is made out with respect to the portion of the judgment below covering taxes on mail order sales based upon catalogs sent by appellant into Illinois prior to the enactment of the Illinois Use Tax Act on July 17, 1961. This is the provision which attempts to make soliciting orders within the State by any form of advertising the basis for an obligation to collect the use tax from Illinois purchasers. Shortly before that date appellant had already sent out its regular semi-annual catalog. Many of the sales on which Illinois now seeks to collect the tax were thus based upon advertising, omitting mention of the tax, which it was too late to recall. Nevertheless, the judgment below covers alleged taxes on all sales after July 17, 1961. (R. 6).

reason for adhering to the rule indicated by such cases as *Miller Bros.* v. *Maryland*, 347 U.S. 340 and *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359.

Fourth, there is strong congressional opposition to any further extension of State power to impose tax obligations upon interstate traders soliciting orders within a jurisdiction. The opposition should carry weight because, under the commerce clause, the will of Congress is controlling and the function of the Court, in the absence of legislative action, is to supply that rule which is most consistent with the presumed legislative intent. *Cooley* v. *Board of Wardens*, 12 How. 299; *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456; cf. *In Re Rahrer*, 140 U.S. 545. And although Congress may not always have the final word as to what constitutes due process in jurisdiction to tax, its judgments, expressed in either action or inaction, carry great weight. *State Board of Insurance* v. *Todd Shipyards Corp., supra*, at 457-458; compare *Katzenbach* v. *Morgan*, 384 U.S. 641.

Congressional skepticism concerning the extension of State taxation of interstate commerce to areas where the interstate trader has slight, if any, contact with a State, was first expressed immediately following the decision in *Northwestern Portland Cement Co.* v. *Minnesota*, 358 U.S. 450. Congress immediately enacted legislation which forbade any State or political subdivision to tax the income of a business derived from interstate commerce if its only activities within the taxing State were the soliciting of orders to be filled by interstate delivery after approval or rejection outside the State. Act of September 19, 1959, 73 Stat. 55 (1959). As applied to mail-order sales the act shows it to be congressional policy that sending catalogs to local customers and filling orders from outside a State—the only kind of contact appellant has with Illinois—is not

a sufficient nexus to support the imposition of a net income tax.

Following *Scripto, Inc.* v. *Carson*, 362 U.S. 207 a bill was introduced to overrule the decision. S. 3549, 86th Cong., 2d Sess. The Senate Finance Committee recommended broadening the scope of a study to be made by the special Subcommittee of the House Committee on the Judiciary on State Taxation of Interstate Commerce authorized by prior legislation. S. Rept. 1574, 86th Cong., 2d Sess. Such a bill became law at the next Congress. Act of April 7, 1961, 75 Stat. 41.

The Special Subcommittee concluded that even the present system "works badly for both business and the States . . . The result is a pattern of State and local taxation which cannot be made to operate efficiently and equitably when applied to these companies whose activities bring them into contact with many States" (*Report* 1127). Manifestly, the inefficiencies and inequities would be greater if nationwide responsibility for collecting use taxes under divergent State and local laws were extended to mail-order houses too small to maintain retail outlets or send solicitors into a jurisdiction, merely on the basis of their distribution of advertising and shipment of goods. The *Report* continued (R. 1128):

> For the company selling in interstate commerce, the likelihood that it will be caught up in the troubles of the system becomes greater with increased exposure through the passage of time and the widening spread of its activities. • • •
>
> • • • the interests of the nation in a free flow of commerce, unhampered by needless interference, clearly call for a change.

The Subcommittee initially recommended that jurisdiction to require the collection of sales or use taxes be limited to situations in which the seller maintained a permanent business location within the State, except when the State entered into a cooperative arrangement, meeting prescribed tests, that would eliminate the burden of complying with the diverse obligations imposed by widely variant State legislation. As applied to mail-order houses, the jurisdictional limitation would conform to the line indicated by the decisions of this Court. *Report* 1177-1187.

After further hearings, the Subcommittee dropped the proposal for a cooperative arrangement. Its Chairman, Mr. Willis, and many of its members introduced identical bills limiting the power of States to collect use taxes upon mail-order sales to situations in which the seller maintained a "business location" within the jurisdiction. H.R. 16491, 89th Cong., 2d Sess. (1965), Section 101(2). Section 511 defines the term "business location" to apply only to a person which owns or leases real property or has one or more employees located within the State.[22]

The House Committee on the Judiciary thereafter submitted a favorable report on the Willis Bill, with only one of its 35 members dissenting. H.Rept. 2013; 89th Cong., 2d Sess. (1966). While one cannot forecast the ultimate action of Congress, the bipartisan and almost-unanimous recommendation of the House Judiciary Committee, reached after long and careful study, is a highly persuasive indication of what the Congress judges the national interest to require.

Under these circumstances, we submit, the established

---

[22] In addition, Section 301 of the bill would permit the seller's State—not the buyer's State—to collect a tax for the State of destination. There is no way of predicting how far such bilateral arrangements may be negotiated between the States. They would eliminate most of the evils inherent in Illinois' present position because sellers would deal with only one taxing authority under one sales tax law.

pattern should not be upset by extending the States permission to require out-of-State firms to collect use taxes upon so tenuous a contact as advertising followed by interstate shipments by common carrier or the United States mails.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Appendix A

STATUTES INVOLVED

A.) The ILLINOIS USE TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*), insofar as it is sought by plaintiff to be applied to defendant in the attendant circumstances. The Court's attention is directed especially to Sections 2, 3, 3a, 5, 6, 7, 8, 9, 12, 12a and 14 of such Act.

Section 2 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.2, as amended by the Act of July 17, 1961):

> "*439.2 Definitions.*] § 2 'Use' means the exercise by any person of any right or power over tangible personal property incident to ownership of that property, * * *. 'Use' shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property * * *.
>
> " 'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property, through a sale at retail.
>
> " 'Purchaser' means any person who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.
>
> " 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration.* * *.
>
> "* * * * * *
>
> " 'Retailer maintaining a place of business in this State,' or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising whether such orders are received or accepted within or without this State."

Section 3 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 110, § 439.3):

"*439.3 Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exceptions.*] § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of 2½% of the selling price of such property if purchased before July 1, 1959, or after June 30, 1965, and at the rate of 3½% of the selling price of such property if purchased after June 30, 1959, and prior to July 1, 1965 * * *

"The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *, and remitted to the Department [of Revenue], pursuant to the provisions of Section 9 hereof.

"The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

"Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. * * *

"* * * * * *"

Section 3a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.3a):

"*439.3a Method of stating tax.*] § 3a. Wherever possible the tax imposed by the Act shall when collected be stated as a distinct item separate and apart from the selling price of the tangible personal property.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.5):

"*439.5 Receipts—List of agents.*] § 5. * * * every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made in or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchaser) a receipt therefor in the manner and form prescribed by the Department [of Revenue]. * * *."

Section 6 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.6):

"*439.6 Certificate and Sub-Certificate of Registration—Separate certificates—Foreign retailers—Permit to collect tax.*] § 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, * * *. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department [of Revenue] (upon a form prescribed

and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the applicant states in his application to be the principal place of business or location from which he will act as a retailer in this State. * * *. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

"The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements * * * as a retailer maintaining a place of business within this State. * * *."

Section 7 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.7):

"*439.7 Direct or indirect advertisement that retailer will absorb tax prohibited—Penalties.*] § 7 It is unlawful for any retailer to advertise or hold out or state to the public or any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assumed

or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department [of Revenue] under the Retailers' Occupation Tax Act or under this Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act."

Section 8 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.8):

"*439.8 Tax collected as debt owed to state—Exception.*] § 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction."

Section 9 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.9):

"*439.9 Due date—Conditional sales—Refunds—Joint and separate returns—Fund.*] § 9 * * * each retailer required or authorized to collect the tax herein imposed shall pay to the Department [of Revenue] the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reim-

burse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. * * *.

"* * * * * *"

Section 12 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12):

"*439.12 Applicable sections and exceptions.*] § 12. All of the provisions of Sections 2a, 2b, 3, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c, 5d, 5g, 5h, 8, 9, 10, 11, 12 and 12½, of the 'Retailers' Occupation Tax Act' in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Section 12a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12a, as added by the Act of July 25, 1961):

"*439.12a Appointment of secretary of state for service of process—Force and effect of service.*] § 12a. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as

a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like, true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit."

Section 14 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 14):

"*439.14 Violations—Penalties.*] § 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of Section 9 or Section 10 hereof, or who fails to keep books and records as required herein, or who files a fraudulent

return, or who wilfully violates any rule or regulation of the Department [of Revenue] for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

"Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

"* * * * *"

"This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupational Tax Act."

B.) The ILLINOIS RETAILERS' OCCUPATION TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 440, *et seq.*), insofar as it is sought by appellee to be applied to appellant in the attendant circumstances.* The Court's attention is directed especially to Section 5 of such Act.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 444):

---

*In this regard, see Section 12, Illinois Use Tax Act, *supra*.

"444. *Failure to make return—Failure to pay tax.*]

* * * * * * *

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department [of Revenue] shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. * * *. The Department shall notify such person or his legal representative, as such, as provided in this Act, of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. * * *. If a protest to the proposed assessment and a request for a hearing thereon is not filed 20 days after notice of the proposed assessment, the Department shall issue a final assessment to such person or to the legal representative of such person.

"* * * * *"

Appendix B

The Impact of an Obligation to Collect Use Taxes upon the Operations of Mail-Order Houses

The actual impact of sales and use tax laws upon interstate commerce, including mail-order transactions, has recently been the subject of detailed study by a Special Subcommittee of the House Committee on the Judiciary. Following the decision in *Northwestern Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, Congress enacted legislation which forbade any State or political subdivision to tax income derived from interstate commerce by a business whose only activities within the State were the solicitation of orders, subject to approval or rejection outside the State, to be filled by interstate delivery. The same statute authorized the House Committee on the Judiciary and the Senate Committee on Finance to make full studies of State taxation of income derived from activities in furtherance of interstate commerce. Act of September 14, 1959, 73 Stat. 555 (1959). In 1960, following the decision in *Scripto, Inc.* v. *Carson,* 362 U.S. 207, a bill was introduced to bar the States from requiring out-of-State firms to collect use taxes upon interstate sales solicited by local brokers. S. 3549, 86th Cong., 2d Sess. The Senate Finance Committee reported out a bill which expanded the study authorized by the Act of September 14, 1959 to include the impact of State and local sales and use taxes. S. Rept. 1574, 86th Cong., 2d Sess. The bill died in the 86th Congress but was revived and enacted as the Act of April 7, 1961, 75 Stat. 41 (1961). The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. Hearings were held during the 87th Congress. Reports were published during the 88th and 89th Congresses.

The reports most relevant to the present case are H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965).

An enormous volume of interstate sales are transacted by the vendor's use of local outlets or solicitors. The Subcommittee's study covered the impact of use-tax collection upon the three largest groups: (A) industrial retailers, which sell machinery and office equipment for consumption by other business establishments; (B) border retailers; and (C) mail-order houses, which send catalogs and other advertising to prospective customers, nationwide or regionally, and then ship any ordered merchandise by common carrier or the United States mail. *Report* 760-774. Although the Subcommittee's conclusions sometimes lump two or three of these divergent types of business into one generalization, we are here concerned only with mail-order houses.

The Subcommittee found that, according to the Census of Business for 1963, there were 4,206 mail-order establishments making almost $2.4 billion in sales. Five catalog houses, which also have retail outlets in almost every State, account for $1.1 billion. They collect use taxes because of their local outlets. The other 4,200 establishments have never collected use taxes, except in States where they have offices, warehouses, and, occasionally, retail stores. The businesses in the latter group vary greatly. Very few have any retail stores. Some are of moderate size. Most are small, even part-time operations. Some, like appellant, carry a broad range of items. Others are specialty houses. Many cater to people seeking gifts for Christmas or birthdays, or to special groups, such as horsemen and yachting enthusiasts.

Two other types of mail-order businesses, not covered by the Census but described in the Report, are potentially affected by use tax legislation: department stores, which generate mail-order sales by newspaper advertisements or

seasonal catalogs (*e.g.* Macy's, Harvard Cooperative Society and F.A.O. Schwarz); and a host of speciality houses too small and scattered to appear in the census. The Book-of-the-Month Club and similar enterprises distributing both books and phonograph records rely heavily, when not exclusively, upon this form of sale.

The Special Subcommittee made a detailed cost study covering one hundred companies. *Report* 53-63, 783-813. Although the cost study pinpoints many facets of inquiry, it has only limited value with respect to the impact upon out-of-State mail-order firms of Illinois' assertion that interstate advertising plus delivery to the mails or common carriers is a sufficient nexus to support imposing upon the out-of-state sellers an obligation to collect its customers' use tax. In the first place only 18 of the 100 firms studied were retailers. All average figures, therefore, are very heavily weighted by the comparatively large taxable size of the average manufacturer's sale. Costs of collection are generally higher for businesses with small average sales. Appellant's average sale is approximately $10. The second factor limiting the value of the study is that the firms studied were collecting use taxes for comparatively few States. Half the participants were making collections for less than four States. Three-quarters of the participants were making collections for less than eight States. *Report* 795. The proposition asserted by Illinois would subject a mail-order business to the costs of making collections for every State in which it had customers, which would nearly always be more than seven and would often be as many as fifty States. The study shows that as the number of States demanding the tax from a firm increases, the costs of collection rise in relation to gross receipts. This is the effect not only of multiplicity but of the higher costs when a larger proportion of the company's sales are subjected to tax. Finally, it must be remembered that any

mail-order firms reflected in this study as making collections for more than four States would have been among the larger concerns because mail-order firms are still making collections only for the home State and any other jurisdictions in which they maintain retail outlets.

At present, collection and payment of use taxes are virtually unknown where the seller does only a mail order business. *Report* 772. Reliable inferences can be drawn, however, partly from analysis of the statutory obligations as applied to the details of mail-order operations and partly from the experience of those houses which are required to, and do, collect use taxes on mail-order sales into States in which they also maintain retail outlets. The impact varies according to the size and nature of the business, bearing most heavily upon the smallest enterprises, but the burdens of acting as a use tax collector are invariably heavier for the out-of-state mail-order seller than the local retail store. *Report* 771, 812.

To illustrate the Subcommittee's findings on these points in specific detail we add examples based upon appellant's experience. Since the case comes up on a motion for summary judgment and appellant's costs were not developed in the record, the information is offered only by way of illustration of matters in the Subcommittee Report.

Sales and use taxes are imposed on sales, not on collections, and the Illinois tax here was assessed on that basis. (R. 2). Such statutes in effect forbid a retailer himself to absorb the tax by paying it (*e.g.*, Ill. Rev. Stat. [1963], Ch. 110, §§ 439.3, 439.7) but, on the other hand, they make no provision for the possibility that the retailer may not be able to collect the tax. Where the local retailer faces a tax-resisting customer personally, he can resolve this dilemma by declining to consummate the sale unless the tax is paid. The cost to him is simply one sale lost, and such confrontations with consumer resistance to sales tax no

longer arise. But the situation of the mail-order retailer is vastly different because the customer is miles away; and his costs, in the collection of taxes, are many times greater.

Those firms which must attempt to collect the sales-use tax in their home States, where their receipt of the benefits of local government makes it just to require them to contribute to its support, know this from experience. One owner of a small mail-order business testified before the Subcommittee that he was unable to collect 75 percent of use taxes. One of the major specialty houses had a 57 percent rate of non-collection; another had a 42 percent rate. The experience of some of the other firms was somewhat more favorable but the Subcommittee cites no instance in which the non-collection rate was less than 30 percent on cash sales. The result, as the Subcommittee observed, "is to cut into what already may be a modest margin of profit on those sales." *Report* 771.

Appellant's own experience bears out these conclusions; it also reveals the reasons. Appellant has retail stores in Alabama, Kansas and Mississippi and therefore acknowledges its liability for the collection of use tax on mail-order sales in those States. But actually recovering the tax from the distant mail-order customer, on a cash sale, is a problem fraught with a succession of costly hurdles. Initially, orders are received, in the main, from customers who were circularized, and these customers normally employ the order blank furnished with the catalog. That order blank contains a reminder (and the percentage) of tax due, and a space in which to calculate the correct amount. Nevertheless, of such orders 22 percent omit the tax.

In addition, there are "repeat" orders from customers, and orders from relatives, friends and neighbors who have been shown appellant's catalog and flyers. These orders come in on the customers' own note-paper. Of these orders over 70 percent fail to include any tax.

When the order reaches appellant, acting as tax collector requires a number of different kinds of additional handlings, or "sorts", in order to make or check this added calculation. Decisions must be made upon whether the deficient order shall be rejected, or the customer billed, or the deficiency ignored because a communication requesting payment would cost more, for printing, inserting, check and postage, than the tax. Only 20 percent of the payments requested are collected—*i.e.*, 80 percent of those billed for deficiency in tax do not pay.

Thus, the appellant winds up by failing to collect approximately 40 percent of the use taxes due on cash sales in the three States in which it attempts to collect use taxes.

The collections vary somewhat among the States. For example, in Mississippi almost 50 percent of the orders fail to enclose the tax. However, in Missouri where appellant's offices and warehouses are located, appellant succeeds in collecting about 80 percent of the tax. The principal explanation for this more favorable local experience appears to be that tax is being collected by an in-State concern from in-State buyers.

Loss of sales and unnecessary labor. Inability to collect payment is only the beginning of the costs of collection for the mail-order seller. Where a remittance is short the tax, the seller immediately has problems and must make choices. A local store-keeper may simply reject the sale, without expense. It costs appellant 11 cents, out-of-pocket per item ordered, in addition to loss of profit, to reject, or "cancel", a sale. The mail-order business depends on handling a large volume of orders simply. For the house with a broad line of merchandise, the key is volume and, if possible, the seller must salvage every possible sale. First, he segregates those orders where the customer is established, or the sale is of such size, or the deficiency of

such amount, that the preferred risk is to fill the order and bill the customer. Already the seller will have incurred a number of extra costs—an additional operation in sorting these orders, and a letter, with a bill—not to mention the ultimate statistical experience that not all the tax billed will be collected. Or he can "back-order" or "hold" the order, writing the customer for the deficiency. This method, of course, only delays decision, and increases the cost, for the order is handled twice. It costs fifty cents for each item of an order which is back-ordered. Hence, in the final analysis, on single-item orders the choice is (a) to fill and bill; or (b) to cancel and refund; or (c) to back-order. All three are costly, although in the first case at least some profit on a sale has been secured.

Multi-item orders are even more difficult. Here another choice is presented—to refrain from filling some one of the items for which the customer has tendered an amount sufficient, if diverted, to pay the tax on the other items. This entails, at best, still more "handling" operations: (a) someone must decide which item to eliminate; (b) someone must calculate and mark the order to show the net difference; and (c) since the item cancelled and the tax deficiency rarely balance, someone must make out a refund check and transmit it to the customer.

This is not the end of the seller's costs. For example, if the tax is 93 cents and a $1.00 item is cancelled, the refund is 7 cents. However, the seller, striving to lose no sale, however small, is also ruefully aware that in a multi-item order, some item or items may be out of stock. If he has cancelled a $1.00 item and then finds that a 98 cent item is out of stock, he will have unnecessarily cancelled the $1.00 item and thus have lost a sale on two items—one unnecessarily. To avoid this, when the remittance is deficient, an order is "red-flagged" while being filled. When it has been filled to the extent possible and is ready

for mailing to the customer, it is reexamined just before mailing (this is the purpose of the "red-flag") to see if out-of-stock items were ordered in amounts sufficient to make up the tax deficiencies. If so, no other items are cancelled; otherwise an item is cancelled and the goods must be carried back to stock. Of course, the seller has again been required to add a number of additional operations, each fractionally but inexorably adding to the cost of handling orders.

Since the mail order business depends upon processing a large volume of sales simply, and therefore cheaply, these additional handlings and exchanges of letters on any substantial number of orders entail enormous expense.

Computation of the tax. The Illinois doctrine would also subject out-of-State sellers to much heavier burdens than local merchants in computing, as well as collecting, the tax. A retail store deals with one set of customers under the laws of a single State. A mail-order house normally receives orders from a number of States. Many houses have a nationwide business and thus receive orders from as many as fifty States—as does appellant. The extent of the burden was graphically described by the Chairman of the Special Subcommittee (112 Cong. Rec. (September 30, 1966) A 5055):

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.

In practice the seller would have to make separate computations on each order according to the customer's residence. Sales and use tax rates vary from State to State; there are eight different current rates: 2, 2 1/4, 2 1/2, 3,

3 1/2, 4, 4.2 and 5 percent.[1] The computation is a burden even where a firm collects a sales tax for its home State and the two or three States in which it may have outlets; but if the liability is extended, "sizable firms with broad lines may have to break down their order processing to enable clerks to specialize in groups of states" *(Report* 771).

Most frustrating are the problems presented by statutory exemptions from tax. The wide variation in exemptions presents literally insoluble problems. Eleven States, for example, exempt food and beverages.[2] Three exempt all clothing and shoes, and one children's clothing and shoes.[3] A few exempt books—a few more exempt only Bibles.[4] One exempts soap and cleansing products (but not for the teeth and beard). In the field of medicines—prescriptions, household drugs, etc. the multiplicity of different exemptions would present staggering problems to mail-order firms. Thus fourteen States exempt prosthetics and medical aids,[5] and one exempts patent medicines;[6]

---

[1] See p. 26, n. 15, above.

[2] In the following compilations, the District of Columbia is counted as a state. Cal. Rev. & Tax Ann. Code § 6359; Conn. Gen. Stat. Ann. § 12-412(m) (1958); Fla. Stat. Ann. § 212.08(1) (Supp. 1965); Me. Rev. Stat. Ann. tit. 36, § 1760(3) (1964); Mass. Retail Sales Tax, §§ 1(6)(h), 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-056, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(b) (Supp. 1966); N. Y. Tax Law § 1115(a)(1); Ohio Rev. Code Ann. §§ 5739.02(B)(2), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(u) (1964); R. I. Gen. Laws Ann. § 44-18-30(J) (1956); Tex. Tax Gen. art. 20.04(K) (Supp. 1966).

[3] Conn. Gen. Stat. Ann. § 12-412(j) (1958) (children's clothing only); Mass. Retail Sales Tax §§ 1(6)(k), 2(5)(b), 3 CCH Sales Tax Rep. §§ 43-059, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(d) (Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(q) (1964).

[4] Md. Ann. Code art 81, §§ 326(s), 375(b) (1965).

[5] Colo. Rev. Stat. Ann. § 138-5-14(f), as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para. 26-064 (July 8, 1965)); Conn. Gen. Stat. Ann. § 12-412(a) (1958); D. C. Code Ann. §§ 47-2605(p), 47-2706(b) (1961); Fla. Stat. Ann. § 212.08(2)

many exempt prescriptions but not "household drugs".[7] A pharmaceutical firm doing retail mail order business in California, New York and Illinois—three of our most populous States—finds, for instance, that California exempts prescriptions, but not prosthetics, household drugs or medical supplies;[8] that New York exempts household drugs, prosthetics and medical aids and that Illinois exempts none.[10] To complicate matters further, some exemptions attach not to the item but to the status or character of the customer (charitable hospital institutions, orphanages, etc.). In order to achieve strict compliance, the mail-

(Supp. 1965); Mass. Retail Sales Tax, §§ 1(6)(l), 2(5)(b), 3 CCH Sales Tax Rep. paras 43-060, 43-212 (March 15, 1966); Md. Ann. Code art. 81, §§ 326(m), 375(b) (1965); N. J. Stat. Ann. § 54:32B-8(a) (Supp. 1966); N. Y. Tax Law § 1115(a)(4); N. C. Gen. Stat. § 105-164.13(12) (1965); Ohio Rev. Code Ann. §§ 5739.02(B)(22), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(m) (1964); R. I. Gen. Laws Ann. § 44-18-30(L) (1956); Tex. Tax-Gen. art. 20.04(L) (Supp. 1966); Va. Retail Sales and Use Tax, § 58-441.6(a) (4 CCH Sales Tax Rep. para 73-153 (March 29, 1966)).

[8] R. I. Gen. Laws Ann. § 44-18-30(K) (1956). Four other states exclude "non-prescription" medicines, which appear to be the same as R. I.'s "patent" medicines: D. C. Code Ann. §§ 47-2605(o), 47-2706(b) (1961); Fla. Stat. Ann. § 212.08(2) (Supp. 1965); Md. Ann. Code art 81, §§ 326(l), 375(b) (1965); N. Y. Tax Law § 1115(a)(3).

[7] Cal. Rev. & Tax Ann. Code § 6369; Colo. Rev. Stat. Ann. § 138-5-14(f), as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para 26-064 (July 8, 1965)); Conn. Gen. Stat. Ann. § 12-412(d) (1958); Ind. Ann. Stat. §§ 64-2654(b)(13), 64-2658 (Supp. 1966); Me. Rev. Stat. Ann. tit. 36 § 1760(5) (1964); Mass. Retail Sales Tax, §§ 1(6)(l), 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-060, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(a) (Supp. 1966); N. C. Gen. Stat. § 105-164.13(13) (1965); N. D. Cent. Code Ann. §§ 57-39-03.7, 57-40-03 (1960); Ohio Rev. Code Ann. §§ 5739.02(B)(22), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(m) (1964); Tex. Tax-Gen. art. 20.04(L) (Supp. 1966); Va. Retail Sales and Use Tax § 58-441.6(a) (4 CCH Sales Tax Rep. para. 73-153 (March 29, 1966)).

[8] Cal. Rev. & Tax Ann. Code § 6369.

[9] N. Y. Tax Law §§ 1115(a)(3), 1115(a)(4).

[10] Ill. Ann. Stat. ch. 120 § 439.3 (Smith-Hurd Supp. 1966).

order firm which shipped catalogs and goods throughout the interstate market would have to check the items of each order against the exemptions in each customer's State. On sales to Wisconsin residents, the procedure would have to be reversed—Wisconsin itemizes what it taxes and not what is exempt.[11]

Checking the exemptions allowed by each State against the individual items in each order received from one of its residents and then calculating the correct amount of tax would be ruinously expensive for any business with a significant range of exempt as well as non-exempt items. The mail-order business depends upon being able to break down the handling of a large volume of orders into a simple series of readily separable steps. Appellant, since it sells chiefly soft goods and standard appliances and merchandise, carries only a small proportion of exempt items, but even in this case figuring the exemptions for its home State and the three States in which the operation of local stores subjects appellant to tax liabilities, would be so burdensome that appellant is driven to ignore exemptions unless the customer claims them.[12] The same course could scarcely be followed by mail order businesses offering a larger proportion of tax-exempt items. Nor is it a satisfactory disposition of the burdens resulting from imposition of multi-State, extraterritorial obligations to say that they can be made tolerable by disregarding integral parts of the very statutes that the States are seeking to enforce.

Records and Audits. Application of use tax to mail-order sales would require, for report and audit purposes, entering and maintaining separate records for every State so choosing in which customers were located. Every sale

---

[11] Wis. Stat. Ann. §§ 77.52, 77.53(1) (Supp. 1966).

[12] The State, and not appellant, is the gainer, for the tax (whether or not collected) is paid over.

would have to be entered, together with the resulting tax, in the ledger appropriate to the State of the customer's residence. Twenty-eight sales tax States require monthly returns; fifteen require returns quarterly.[13] This volume of paperwork is not required of a local merchant for he deals with only a single State. In addition, the sales and use tax laws require a seller to keep elaborate supporting records to be furnished, upon audit, to verify the payments.[14] To undergo multiple audits for different States would be time-consuming and prohibitively expensive. Sometimes compliance would be impossible without closing the establishment; for example, if a State demanded (as some laws provide) that the original books of account be delivered to the State authorities for audit.[15] A mail-order enterprise could not function without its books—assuming they could be delivered. Sometimes literal compliance would result in conflicting obligations; for example, where two States request delivery of the books of account at the same time. Other States permit a retailer to choose an office audit, if he will pay the expenses thereof. The cost of the travel and living expenses, and fees of auditors (usually two) from any number of States would be ruinous.

The burden of record-keeping can be eliminated only by non-compliance—which is in fact what is done in practice. Appellant keeps accurate statistical information for internal purposes from which it can draw reliable esti-

---

[13] See p. 27, n. 17 above.

[14] As every mail order customer knows, the customer's order is returned with the shipment. If the order is to be retained for a supporting record, a duplicate must be made—at enormous added cost on a volume of millions of orders.

[15] *E.g.*, Cal. Rev. & Tax Code § 7053, Tax Board Ruling No. 2098, 2 CCH Sales Tax Rep. par. 24-634 (1936); Fla. Stat. Ann. § 212.13(2) (Supp. 1965); Ill. Stat. Ann. § 439.11 (Smith-Hurd Supp. 1966) and Article 7 of the regulations of the Illinois Department of Revenue, 2 CCH Sales Tax Rep. par. 34-507 (1966).

mates of the volume of sales by States. The States in which appellant has stores or property accept those estimates, and the statutory duty to keep accurate records is ignored. Perhaps a few other firms could follow the same practice, but there are thousands which could not make reliable returns acceptable to tax collectors without keeping new, separate records for every State in which their customers were located. Nor does it eliminate the constitutional relevance of the onerous, extraterritorial consequences of a statute to show that they are so plainly too burdensome that even the officials charged with enforcement are forced to overlook violations.

Local taxes. The theory of the decision below would render a mail-order house with a single location liable to collect and pay over use taxes for literally thousands of counties, municipalities and even school districts [16] which, by virtue of authority delegated by the State, impose sales and use taxes and purport to require out-of-State vendors to make collections.[17] In 1940 only a handful of cities imposed a sales tax. By the end of 1964 the number of sales tax localities had risen to 2,329—2,133 municipalities, 194 counties and 2 school districts located in 15 States. In many instances compensating use taxes are also imposed. *Report* 841-845. Argument is unnecessary to demonstrate the impracticability of sorting orders by the smallest political subdivisions, ascertaining its boundaries and reviewing each order to allocate it territorially, checking the

---

[16] In Alabama use taxes are collected by "Police Districts"—the boundaries of which appear not to conform to, but to overlap, counties, towns, or other local subdivisions.

[17] Some localities' ordinances imposing such taxes contain provisions stating that they do not levy a tax "on a bona fide transaction in interstate commerce." Nevertheless, this does not impede their applying their laws to mail-order sales. For example, appellant recently received a demand from Washington Parish, Louisiana, whose officials, apparently following the example of Illinois, had issued appellant a Certificate of Registration though never applied for.

rate of tax, collecting the tax from the customer, keeping appropriate records, and making remittances. On top of all the other difficulties of dealing with hundreds of jurisdictions, even where somewhat simplified by funneling the local taxes through the State's collection machinery there would still remain the problems resulting from the simple fact that the post office address furnished by the customer does not accurately identify the municipality, county or school district in which he lives. The only possible conclusion is fairly stated in the Subcommittee's Report (pp. 882-883):

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential out-of-State registrants, the record-keeping task of multi-state sellers would be *clearly intolerable.*

Local taxes aside, it is impossible to appraise with accuracy the net effect of imposing these discriminatory burdens upon out-of-State mail order businesses under Illinois' theory of nexus. The few very large mail-order houses have had the resources to adapt themselves to seller collection without ruinous cost. The Report noted that, for the major catalog house, "the responsibility to collect sales taxes causes clerical work and some losses" but that the "problems are small when compared to similar problems handled in the regular course of business." *Report* 772. Later, the Subcommittee observed that the compliance costs were "supportable" by most companies then collecting use taxes outside their home States—chiefly industrial retailers and large, catalog houses maintaining nationwide retail outlets. But the Subcommittee added (*Report* 812):

> An exception must be made to this conclusion for the interstate seller in a low volume, low unit price business—typically the small mail order business. . . . No small mail-order house has been found which collected sales tax for more than one or two States; however, the study of cost relationships in other forms of business strongly indicates caution for cost reasons alone toward extension of the collection responsibilities of this special form of interstate seller.

The major catalog houses which could support the compliance costs comprise "only a tiny minority of all mail-order businesses." Report 770. Most of them are already collecting use taxes for the States where their customers reside because of their local operation of retail stores. Efforts to extend jurisdiction to wholly out-of-State firms therefore bear primarily upon the very much larger number of very much smaller businesses. *Ibid.*

SUPREME COURT, U. S.

FILED
JAN 13 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF AMERICAN HERITAGE PUBLISHING CO., INC. AS AMICUS CURIAE

JAMES B. LEWIS
JAY H. TOPKIS
575 Madison Avenue
New York, N. Y. 10022

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
ALLAN A. TUTTLE
Of Counsel

January 12, 1967

INDEX

	PAGE
Interest of the Amicus Curiae	1
The Statutes	4
Question Presented	4
Argument	5
A. The Laws Involved and Their Impact	5
1. The Laws	5
2. The Industry affected	6
3. What Compliance entails	7
4. Costs of Compliance	9
5. The Collection Dilemma	11
6. The Lack of Benefit conferred bv the Taxing State	12
B. As Applied Here, the Illinois Statute in Issue Is Unconstitutional	13
1. The Lack of Connection with Illinois	14
2. The Lack of Benefit conferred by Illinois	16
Conclusion	18

CITATIONS

Cases

American Oil Co. v. *Neill,* 380 U. S. 451 (1965) 16

General Motors Corp. v. *Washington,* 377 U. S. 436 (1964) 17

Miller Bros. Co. v. *Maryland,* 347 U. S. 340 (1954) .. 14, 15, 16

PAGE

Nelson v. *Montgomery Ward & Co.*, 312 U. S. 373 (1941) 6

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359 (1941) 6

Scripto, Inc. v. *Carson*, 362 U. S. 207 (1960) 16

State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So. 2d 91 (1965) 3

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435 (1940) . 16

Constitution and Statutes

Constitution of the United States:

Article I, Section 8 (Commerce Clause) ...5, 14, 17, 18

Fourteenth Amendment (Due Process Clause) . .5, 14, 15

Illinois Use Tax Act (Ill. Rev. Stats. [1963], ch. 120, §§ 439.1 *et seq.* 4, 5

Section 2 4

Section 3 4

Section 12 7

Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. [1963], ch. 120, § 441a 7

Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts 1966 6

New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966 6

Rhode Island Sales and Use Tax Act, ch. 18 and 19 of Tit. 44 of the General Laws of Rhode Island 1956, as amended by H.B. 1730, Laws 1966 6

Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950, ch. 151, Laws 1966 ... 6

Miscellaneous

PAGE

Millican, *Selling By Mail Order,* Small Business Bibliography (U. S. Small Business Administration Pub. No. 3, January 1965 Revision) 7

Report on State Taxation of Interstate Commerce (Special Subcommittee on State Taxation of Interstate Commerce, Committee on the Judiciary, House of Representatives) H. Rept. 565, 89th Cong., 1st Sess. 3, 5, 6, 7, 8, 9, 10, 11, 12, 13

Statistical Abstract of the United States 6, 7

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF AMERICAN HERITAGE PUBLISHING CO., INC. AS AMICUS CURIAE

This brief is submitted with the written consent of counsel for both parties, filed with the Clerk of the Court.

Interest of the Amicus Curiae

American Heritage Publishing Co., Inc. ("Heritage"), a New York corporation with offices in New York City, publishes the hardcover magazines AMERICAN HERITAGE and HORIZON and books on historical, cultural and educational subjects. AMERICAN HERITAGE is a scholarly, but

artistic and graphic, magazine of American history established with the enthusiastic support of distinguished educators, historians and eminent citizens for the purposes of educating the public and advancing historical writing. In 1954 Heritage began publishing AMERICAN HERITAGE in its present format with the sponsorship of the Society of American Historians and the American Association for State and Local History and under the editorship of Bruce Catton. In 1958 Heritage began publishing HORIZON, a cultural magazine devoted to the arts, archeology and the entire field of world civilization.

Because of the absence of bookstores from many parts of the United States and their diminishing number in the major cities, Heritage has had to improvise its own retailing techniques for its specialized publications. Heritage solicits orders by direct mail advertising and by advertisements in national magazines.[1] Heritage receives orders by mail, which it accepts outside Illinois; mails the ordered publications to its customers;[2] and bills its customers and receives their remittances by mail.

Heritage has not attempted to collect sales or use taxes on its sales to residents of states other than New York because of its belief that the states cannot validly impose the duty of collection upon direct-mail vendors having no business location or employee in the taxing state. That this belief is generally held is shown by the recent finding of a Congressional Subcommittee that "[c]ollection or payment

---

[1]Representative direct mail and magazine advertisements are appended.

[2]A relatively minor portion of Heritage's publications are sold, through the medium of trade publishers, to schools and by bookstores. Heritage is not the retail seller of these items; the bookstore or other retail seller has the responsibility to collect and remit any state or local sales tax.

of sales tax in a State where a firm does only mail-order business is virtually unknown."[3]

Illinois is now attempting to assess against and collect from Heritage thousands of dollars in use taxes with respect to mail-order sales made to Illinois residents since July 1, 1963, even though Heritage has no business location or employee in Illinois. Illinois—along with 20 other states—has enacted legislation requiring out-of-state retailers who solicit orders in the state by means of catalogs or other advertising to collect and remit use taxs on articles sold for use in the state, even though they have no business location or employees within the state. The legislation provides that the tax required to be collected by the retailer, whether or not actually collected, constitutes a debt owned by the retailer to the state.

Alabama is the only other state that has attempted to force Heritage to collect use taxes on its mail-order business. Alabama's attempt failed because the Alabama Supreme Court, on January 21, 1965, held that Alabama could not constitutionally require mail-order sellers to collect the use tax. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 So. 2d 91 (1965). Affirmance of the decision below would validate the claim of Illinois, revive the claim of Alabama and encourage the other 19 states having similar statutes to make similar assessments with respect to both past and future sales, amounting to many thousands of dollars. Heritage could not collect the tax on past sales from its customers and, as we show in the argument below, could not efficiently collect the tax on future sales.

---

[3]Report on State Taxation of Interstate Commerce (Special Subcommittee on State Taxation of Interstate Commerce, Committee on the Judiciary, House of Representatives), H. Rep. 565, 89th Cong., 1st Sess. 772 (1965). This Report (hereinafter cited "Report") was prepared after an exhaustive study spanning several years and including extended hearings and numerous questionnaires.

The Statutes

The Illinois Use Tax Act, section 3 (Ill. Rev. Stats. [1963] ch. 120, § 439.3) provides in pertinent part:

> "§ 3 A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail. . . .
>
> * * *
>
> "The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State . . . and remitted to the Department. . . ."

Section 2, as amended by the Act of July 17, 1961 (Ill. Rev. Stats. [1963] ch. 120, § 439.2) defines "retailer maintaining a place of business in this State" as used above:

> "'Retailer maintaining a place of business in this State', or any like term, shall mean and include any retailer:
>
> * * *
>
> "2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."

Question Presented

The Illinois Use Tax Act requires any out-of-state retailer that solicits orders in Illinois by advertisement—even though it has no business location or employee in Illinois—to collect and remit use taxes upon merchandise sold for use in Illinois. The Act makes a retailer that fails or is unable to collect the tax from the purchaser directly

liable for the tax. The question presented is whether these provisions of the Act violate the Due Process Clause of the Fourteenth Amendment to or the Commerce Clause of the United States Constitution.

Argument

The Illinois Use Tax Act imposes on out-of-state mail-order retailers, such as Heritage and the appellant, the duty to collect and remit the use tax levied on the customer's use of the purchased article within Illinois. The Act makes the out-of-state retailer the insurer of the tax, since it requires the retailer to remit the tax whether or not the retailer can and does collect it. The Act, in imposing these duties upon out-of-state mail-order retailers having no business location or employee within Illinois, creates an unconstitutional burden on interstate commerce and is a denial of due process of law.

A. The Laws Involved and Their Impact.

1. *The laws.* Forty-two states now impose retail sales taxes and compensating taxes on the use of goods brought into the state. Twenty-one of these state statutes make the mere sending of advertisements into the state a sufficient basis for requiring out-of-state retailers to collect and remit use taxes.

In addition, compared to a handful 20 years ago, by the end of 1964 a total of 2,329 local governmental units—composed of 2,133 municipalities, 194 counties, and 2 school districts—had sales taxes.[4] At that time 701 of these also had compensating use taxes.[5]

Since the date of the decision below—January 25, 1966—three states have enacted sales and use tax statutes contain-

[4] Report 845.
[5] *Id.* at 846.

ing the advertising provision[6] and one state has amended its sales and use tax statute to include such a provision.[7] Affirmance of the decision below would accelerate this legislative trend at the state level and encourage its expansion on the local level. Affirmance would also result in a wave of enforcement activities against out-of-state mail-order retailers, resulting in heavy liabilities for use taxes that they did not and were not seriously expected to collect from their customers in the past,[8] and cannot efficiently collect in the future.

2. *The industry affected.* The advertising provisions of the state and local use tax laws are obviously aimed at the middle-sized and smaller mail-order retailers. The 1963 Census of Business reported 4,206 mail-order establishments with annual sales of almost $2.4 billion.[9] Nearly three-quarters of these sales were catalog sales of the five leading mail-order houses.[10] Since three of these houses also have retail outlets nationwide and the other two have outlets in certain states, they are wholly or substantially subject to taxation under existing constitutional interpretations.[11] These large houses collect and remit sales or use taxes on an annual sales volume of approximately $1.1 billion.[12]

---

[6]Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts, 1966; New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966; Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950 as amended by ch. 151, Laws 1966.

[7]Rhode Island Sales and Use Tax Act, ch. 18 and 19 of Title 44 of the General Laws of Rhode Island, 1956, as amended by H. B. 1730, Laws 1966.

[8]See Report 772 and text at note 3, supra.

[9]Statistical Abstract of the United States 815 (1966) and Report 772.

[10]Report 772.

[11]Nelson v. Sears, Roebuck & Co., 312 U. S. 359 (1941); Nelson v. Montgomery Ward & Co., 312 U. S. 373 (1941).

[12]Report 772.

Although they account for the bulk of the sales, these large houses are only a tiny minority in number of all mail-order businesses. The great majority of mail-order businesses are very small, making only a few thousand dollars of sales annually.[13] Many are part-time operations[14] and one-man shops[15] that fill their few orders of an evening out of a limited inventory. Indeed, there are more small mail-order operations than indicated by the census, since the census omitted data for firms with less than $2,500 in annual sales. Also omitted from the census were many businesses that solicit orders for one or a few items by spot advertisements in special interest periodicals.[16] The Special Subcommittee on State Taxation of Interstate Commerce concluded in its study that "it becomes difficult to find any justification for a State's imposing its collection requirements on companies of this kind."[17]

3. *What Compliance entails.* Compliance by an out-of-state mail-order business with a state's use tax requirements begins with registration with the state[18] and, often, the posting of security.[19]

The mail-order seller must attribute each transaction to the proper taxing jurisdiction. This may not be too difficult in the case of state taxes, but correct attribution becomes more and more difficult as the seller must determine

---

[13] *Id.* at 770.

[14] Millican, *Selling by Mail-Order*, Small Business Bibliography (U. S. Small Business Administration Pub. No. 3, January 1965 Revision).

[15] Statistical Abstract of the United States 814 (1966).

[16] Report 773.

[17] *Id.* at 774.

[18] Hawaii, the single exception, requires no registration: *Id.* at 679.

[19] Illinois has a mandatory security requirement, Section 12, Illinois Use Tax Act (Ill. Rev. Stats. [1963] ch. 120, § 439.12) incorporating by reference Section 2a, Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. [1963] ch. 120, § 441a).

into which of ever smaller taxing jurisdictions the goods are headed.[20] Inquiry addressed to the prospective purchaser, which may be the only key to attribution, will usually either evoke no reply or kill the transaction.

Next, the mail-order seller must determine whether the particular transaction is taxable or not. Sales for resale are universally not taxed;[21] sales for incorporation into an item ultimately for resale commonly are not. Additionally, there are categories, which vary widely from state to state, of exempt property and exempt purchasers. Nontaxability is usually established by obtaining a resale or exemption certificate from the purchaser, which vary in form and requisites for validity.

Reporting requirements vary from state to state. In 1965, about one-half of the taxing states required reporting on an accrual basis, two favored cash reporting and the rest gave a choice. A number of states required one method for sales and another for use taxes.[23] The rules of the accrual basis states with respect to bad debts vary, and few mail-order sellers are equipped to maintain a separate set of bad debt records for every taxing jurisdiction.

Demands for detail and itemization of deductions also differ widely. One state may lump together all sales to exempt persons and institutions, while another will provide a separate line for each type of exempt sale.[25] An interstate vendor must either record all sales in sufficient detail to meet the requirements of the most demanding state, or maintain different kinds of records for each taxing jurisdiction. "Either choice means extra compliance effort for the multistate firm."[24]

---

[20]Report 863.
[21]*Id.* at 645.
[23]*Id.* at 688.
[25]*Id.* at 693.
[24]*Ibid.*

The frequency of tax filings and remissions also multiplies the work of an interstate firm. Nearly three-quarters of the sales tax states require sellers to file sales tax reports monthly; somewhat fewer require monthly use tax reports.[25] These returns must be filed regardless of whether any taxable sales are made into the state.[26] "To a seller with little or no taxes to remit, having to file numerous returns is particularly vexatious."[27]

Remission of the tax is not the final step, for audit, which can be made only at the vendor's office, frequently ensues. The number of taxing jurisdictions has reached the point at which audit can be a continuous process. The vendor not only loses the time and energies of its own personnel, but is often required to defray the travel and per diem expenses of the visiting state auditors.[28]

Finally, there is the problem and expense of keeping abreast of constant statutory and interpretative changes in the rules of distant jurisdictions and of the mushrooming enactment of new state and local taxes and new advertising collection requirements.

4. *Costs of Compliance.* The Subcommittee on State Taxation of Interstate Commerce has undertaken a study of the costs of compliance with sales and use tax requirements for one hundred businesses with multistate operations.[29] The businesses studied ranged from companies present and qualified to do business in various states to

---

[25] *Id.* at 694.

[26] Exhibit A, Statement of Charles H. Schreyer, representing the Manufacturers Association of Connecticut, Inc. and the Conference of State Manufacturers Associations, Hearings before the Special Subcommittee on State Taxation of Interstate Commerce, Committee on the Judiciary, House of Representatives, 87th Cong., 2d Sess. 25-29 (1962).

[27] Report 696.

[28] *Id.* at 698.

[29] *Id.*, ch. 25.

companies whose connections with the taxing states were as attenuated as those of the appellant and of Heritage.

The heaviest expense of the interstate companies was that of recordkeeping, resulting partly from complexities inherent in multistate selling.[20] The Subcommittee concluded that "a small mail-order business charging sales tax wherever applicable would be in an unfortunate cost position as to records alone. . . ."[21] Other expenses included those of filing (which not uncommonly exceed the amount of tax remitted), training, study, planning and supervision.

Although the Subcommittee found the overall costs bearable for most types of interstate companies studied, it cautioned that mail-order businesses present a special problem:

> "An exception must be made to this conclusion for the interstate seller in a low volume, low unit-price business—typically, the small mail-order business. . . . The interstate seller of consumer goods . . . . has the same costs as a local firm selling the same types of items plus the added costs of complying with the laws of many States at once. No small mail-order house has been found which collected sales tax for more than one or two States; however, the study of cost relationships in other forms of business strongly indicates caution for cost reasons alone toward extension of the collection responsibilities of this special form of interstate seller."[22]

The Subcommittee concluded in its Report that compliance by small mail-order businesses with the require-

---

[20] *Id.* at 803.
[21] *Id.* at 804.
[22] *Id.* at 812.

ment that they act as the states' use tax collectors is "almost out of the question."[33]

5. *The Collection Dilemma.* The most serious problem—that of collecting the tax from the mail-order customer—remains to be discussed.

Mail-order retailers face difficulties in collecting use taxes that are not shared by out-of-state retailers that solicit through salesmen. The latter collect the tax with practically the same ease as local over-the-counter retailers, because the salesman computes the tax in taking the order and the customer, at the time he signs the order, sees the computation of the tax and agrees to pay it. There is simply no way in which the retailer that solicits by mail or through national publications can obtain the same degree of consumer acceptance of the tax.

Mail-order retailers would find it prohibitively expensive to prepare a different set of advertising brochures for every taxing state or locality. It would be equally impractical for them to embody a list of all state and local sales tax computations in its direct-mail advertising material. Advertising in national publications presents precisely the same problems. (See in this connection the appended advertising material.) The mere statement in the mail or magazine advertisement that state or local sales tax will be computed and added to the sales price would generally be overlooked or forgotten and, therefore, would not substantially promote customer acceptance of the tax.

The results are (1) that the customer who sends in his payment with his order generally will not compute and pay the tax[34] and (2) that the customer who is billed later will

---

[33] *Id.* at 773.

[34] When, as is often the case, the cash customer pays the sales price but not the tax, the mail-order retailer has the option of rejecting the order, sending out the merchandise with a request for payment of the tax that he knows from experience will probably be ignored, or absorbing the loss. Usually he will choose the last course.

resent the unexpected computation and charging of the tax. He may express his resentment by returning the purchased article (a privilege generally available to mail-order purchasers), by eliminating the tax from his payment, by protesting that the charge had not been agreed to, or by questioning the validity of the tax charge. The mail-order retailer must either (1) charge the tax and accept the resulting loss of sales, inconvenience and customer ill-feeling, as well as a substantial percentage of noncollection,[35] or (2) forego the charge and simply absorb the tax. A substantial part of the mail-order industry finds the latter the less painful alternative.

In short, the problem is that for mail-order transactions the decision to buy and the levy of the tax do not coincide. The mail-order seller simply cannot create the simultaneity of sale and tax computation that is the only key to a high degree of customer acceptance and remission of the tax. Other sellers can successfully discharge their tax collection duty; the mail-order seller cannot. The collection duty would turn the mail-order retailer, not into a tax collector, but into a taxpayer. Inescapably, regardless of whether he attempted to charge and collect the tax, he would have to bear all or a substantial part of the tax burden directly.

Therefore, the mail-order retailer has, in addition to the costs already discussed, the cost as insurer of collection. Vendors who fail to collect the tax do so at their peril, for they must remit the tax to the state regardless of whether they collect it from the customer. The mail-order business with no personnel in the taxing state, faced with the lowest rate of customer compliance, is again in the worst position.

6. *The Lack of Benefit conferred by the Taxing State.* The Subcommittee found that the basic cause for failure

[35] See Report 771 as to reported rates of noncollection.

to comply with use tax collection requirements of foreign states was "the common element of tenuous nexus, of a relationship which is sufficiently indirect that companies feel no strong sense of identification with the State."[86] For the pure mail-order seller there must be added to the lack of relationship and identification the total lack of benefit conferred by the taxing state.

The typical mail-order seller has no personnel or property receiving any benefit from the foreign state's laws; he does not use its roads or other facilities; he does not seek the protection of its police force; his sales are individually so small that he never resorts to its courts for collection; in sum, he receives nothing of benefit from the state's laws or administration. The state, being powerless to interfere with his use of the mails in interstate commerce, has not even any regulatory or permissive function to exercise. It is the lack of benefit conferred in relation to the excessiveness of the burden imposed that is the vice of the advertising provisions of the state use tax law.

B. As Applied Here, the Illinois Statute in Issue Is Unconstitutional.

The years since the Great Depression have seen the various states and municipalities seek ever more energetically and ingeniously for new sources of tax revenue. A spate of litigation has resulted, and this Court has repeatedly been required to determine whether a state might constitutionally lay its taxing hand upon a particular individual or enterprise. These decisions have seen some of the Court's more memorable divisions.

But as we read the opinions, those in dissent and concurrence as well as those for the Court, on this proposition

---

[86] *Id.* at 732.

there would appear to be accord: the Due Process Clause and, *a fortiori,* the Commerce Clause are offended by a state's attempting to impress into tax-collection service a seller who enters the state's borders only via the mails.

1. *The Lack of Connection with Illinois.* Review of these authorities may best begin with *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (1954). There, it will be recalled, Miller Brothers operated a store in Wilmington, Delaware. It had no place of business or employees outside of Delaware, and it made sales only over-the-counter on its Delaware premises. However, Miller Brothers did advertise in Delaware newspapers which had some circulation in Maryland, as well as on radio stations whose signals reached into Maryland. And sales circulars were mailed to former customers in Maryland. Responding to these various advertisements, some Maryland residents visited the Miller Brothers store in Wilmington and made purchases. Upon request, Miller Brothers delivered the purchased items to Maryland purchasers either by common carrier or by its own truck—over a four-and-a-half year period, the Miller Brothers' truck delivered approximately $8,000 worth of merchandise to Maryland.

Maryland interpreted its use tax law to require Miller Brothers, in these circumstances, to collect and remit its tax on goods destined for Maryland. Miller Brothers did not collect and pay over the tax. Thereupon, in an effort to enforce the tax, Maryland seized Miller Brothers' delivery truck while it was within Maryland's borders.

The Court held Maryland's action offensive to the Due Process Clause. Said the Court, at 344-5:

> ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

In the view of the majority, even the regular visits to Maryland by the Miller Brothers' delivery truck did not establish a sufficient link. The Court concluded, at 347:

> "That these inhabitants [of Maryland] incurred a liability for the use tax when they used, stored or consumed the goods in Maryland, no one doubts. But the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here."

For the dissenters, Mr. Justice Douglas noted first the "minimal burden" which the duty to collect the tax would impose upon Miller Brothers:

> "When appellant's sales clerks make out the sales slips and arrange for the shipment of the purchased goods, they surely will know which are destined for Maryland, which for some other State. Hence to make appellant add the Maryland use tax to the bill when the purchaser requests that the goods be shipped to Maryland is only a minimal burden." 347 U. S. at 357.

The dissent then pointed to the advertising campaign aimed by Miller Brothers at Maryland customers and to the "regularly effected" deliveries by Miller Brothers' own truck. Accordingly, "This is not a case of minimal contact between a vendor and the collecting State." 347 U. S. at 358. Due process, the dissent concluded, was satisfied.

The rationales of both majority and dissent in *Miller*, we suggest, lead to the conclusion that Illinois infringes upon the Due Process Clause when it attempts to make tax collectors of enterprises like the appellant and Heritage —which enter the state only by mail.

So far as the *Miller* majority is concerned, there is less "link" or "connection" between the appellant or Heritage and Illinois than there was between Miller Brothers and Maryland. For Miller Brothers not only mailed and broadcast into Maryland; it regularly sent its truck and its driver-employees into the state.

And neither of the two considerations which impressed the *Miller* dissenters is present here. First, as we have seen, a heavy burden would be imposed upon Heritage or any exclusively mail-order enterprise, were it obliged to collect the tax: it has no face-to-face contact with its customers, such as Miller Brothers had, at which the tax may be calculated and collected. Rather, the real consequence of making Heritage a tax collector would be to make it a taxpayer.

Second, Heritage's contacts with Illinois are surely "minimal" as the *Miller* dissent used the term: no Heritage truck or employee ever enters the state, only its mailings and advertisements. It would appear, accordingly, that the *Miller* dissent would not support Illinois in the matter at bar.

Miller's authority is today unchallenged. Its central thesis—that due process requires *some* connection between a taxing state and an out-of-state vendor—has been restated repeatedly, *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 210-11 (1960); *American Oil Co.* v. *Neill*, 380 U. S. 451, 458 (1965). Here that connection is lacking.

2. *The Lack of Benefit conferred by Illinois.* We may take guidance also from *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), a case pertinent here not for its holding but for its careful articulation of the requirements of due process in a taxation context. There, Wisconsin sought to collect a tax on the payment of dividends from a foreign corporation licensed to do business in Wisconsin.

Sustaining the tax against a Fourteenth Amendment attack, the Court said, per Frankfurter, J., at 444:

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> * * *
>
> "[The] . . . test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

Thus, due process imports a kind of bargain: when the state performs a service, it may impose a duty, but it may not lay its taxing hand upon a distant enterprise to which it offers nothing. The *Penney* test was later approved and applied as the test of validity under the Commerce Clause, *General Motors Corp.* v. *Washington*, 377 U. S. 436, 440-41 (1964):

> "[T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. . . . In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded."

Applying that test to the facts at bar, it appears that Illinois here would impose a heavy burden upon the appellant, upon Heritage and upon other mail-order enterprises, but offers them nothing in return. They do not avail themselves of its police protection or health or any other service—from Illinois they ask and receive nothing. Their reliance is entirely on a federal instrumentality: the mails. In consequence, for Illinois to attempt to compel them to collect its taxes is offensive to due process and to the Commerce Clause.

Conclusion

The decision below should be reversed.

Respectfully submitted,

James B. Lewis
Jay H. Topkis
575 Madison Avenue
New York, N. Y. 10022

Paul, Weiss, Rifkind, Wharton
& Garrison
Allan A. Tuttle
Of Counsel

January 12, 1967

A CATALOGUE OF ITEMS IN

THE AMERICAN HERITAGE SUNDRY DEPARTMENT

THE SUNDRY DEPARTMENT

—is a collection of the various publications and related items produced by American Heritage Publishing Co., Inc.: in-print issues of AMERICAN HERITAGE and HORIZON, American Heritage Books, Horizon Books, books for young readers, including *Caravel Books* and the *Junior Library*, and products of special interest such as the Greek Kylix and Fiddle Rail Book Rack.

The catalogue is distributed only to subscribers and owners of our magazines and books. Many of the prices are below list, and many of the items are available nowhere else.

We hope you will find both this catalogue's subjects and its size appropriate for keeping, a handy place to shop for anything from a back issue you've misplaced to a history you'd like to read, or a Christmas or wedding or thank-you present of some distinction.

Please be sure to order each item by number, via the form provided. That will speed our service considerably. Thank you.

AMERICAN HERITAGE

AMERICAN HERITAGE began publication as a hard-cover bimonthly (six issues a year) in 1954. Since then the magazine has grown until today its subscribers number over 310,000.

Each 112-page issue contains 12 to 14 articles, and about 100 illustrations, one fourth of them in excellent color: oil paintings, water colors, photographs, engravings, vintage posters, cartoons, lintels, lithographs....

The Senior Editor is Bruce Catton, most honored of all Civil War historians; the Editor is Oliver Jensen, historian and authority on pictorial journalism. An Advisory Board of eminent scholars is headed by Dr. Allan Nevins, Pulitzer Prize-winning dean of American historians.

Every copy measures 8¾ by 11½", is bound in hard covers, and contains *no* advertising.

AMERICAN HERITAGE is sponsored by The American Association for State & Local History, and The Society of American Historians.

$3.95 a copy

SUBSCRIPTION PRICE: $15.00 A YEAR (SIX ISSUES)

Code number for your own subscription order **(1000)***

Code number for a gift subscription order **(2000)***

*(If you are now a subscriber, please *do not* use the Sundry form to order Christmas gifts, or to renew your subscription. Special forms will be mailed to you.)

AMERICAN HERITAGE
AMERICAN HERITAGE
AMERICAN HERITAGE
AMERICAN HERITAGE
BACK ISSUES OF AMERICAN HERITAGE
AMERICAN HERITAGE
AMERICAN HERITAGE
AMERICAN HERITAGE
1925
AMERICAN HERITAGE

Back Issues of AMERICAN HERITAGE

ISSUES NO LONGER AVAILABLE: *First two years* (December 1954-December 1956), April 1957, August 1957, April 1958, December 1959, December 1960, February 1963, April 1963, April 1965.

Available issues, with a few highlights from each:

FEBRUARY 1957—An interview with a Sioux Indian who said he killed Custer...discovery of a hitherto unknown conspirator in the plot to murder Lincoln. **(014)**

JUNE 1957—A color portfolio of Currier & Ives...how two spinsters gave women's suffrage a boost...J. P. Morgan's one-man fight against the panic of 1907. **(016)**

OCTOBER 1957—The first man to walk across the continent . . . a secret operation on President Cleveland...two lost letters of Mark Twain and Walt Whitman. **(018)**

DECEMBER 1957—"An Iowa Christmas"... "The Gibson Girl"...eyewitness recalls Pickett's charge...Stewart H. Holbrook retells Carry Nation's shattering exploits. . . . T. R. on the telephone. **(019)**

FEBRUARY 1958—"Unwanted Treasures of the Patent Office"...Henry Ford's peace ship ...Lucius Beebe tells the real story of driving the golden spike. **(020)**

JUNE 1958—"The Battle of the Saintes" by C. S. Forester...the first great Texas oil strike...George C. Tilyou, "The Master Showman of Coney Island." **(022)**

AUGUST 1958—Henry Steele Commager tells of "Jefferson and the Book Burners"... Bruce Catton on the battle of Antietam... the great Niagara tight-rope walker. **(023)**

OCTOBER 1958—"Was John Smith a Liar?"... the infamous slave trade...Cyrus Field's Atlantic cable...Isaac Singer and his "Wonderful Sewing Machine." **(024)**

DECEMBER 1958—How American and Soviet armies first met in battle..."A Victorian Christmas Album" in color..."The Hawthornes in Paradise," by Malcolm Cowley . . ."Ghosts in the White House" **(025)**

FEBRUARY 1959—"The Marine Tradition"... "The Stanleys and Their Steamer"..."Pioneers and Petticoats"...a rare collection of pre-Columbian gold objects. **(026)**

APRIL 1959—"The Elizabethans and America," by the English authority A. L. Rowse ...the case of the runestone hoax..."Puccini in America." **(027)**

JUNE 1959—The gallant defense of Wake Island:..New York's bloody draft riots... "The Last of the Bosses," James Michael Curley...covered bridges in color. **(028)**

AUGUST 1959—"Prison Camps of the Civil War" by Bruce Catton...a portfolio of old railroad cars...bareknuckle boxing's last great fight. **(029)**

OCTOBER 1959—Edison: the last days of a wizard...life at Monticello, by one of Jefferson's slaves...the author of "What Price Glory" recalls World War I. **(030)**

FEBRUARY 1960—How an American radical won a

hero's burial inside the Kremlin...Wilbur Wright teaches Europe to fly . . . "Arthur Vandenberg," by Dean Acheson. **(032)**

APRIL 1960—America's first frogman...how T.R. stopped a great coal strike...a comically cold war between the U.S. and England...ice-age footprints. **(033)**

JUNE 1960—A profile of our last king, by Dr. J. H. Plumb...the true story of the 1919 "Black Sox" baseball scandal...how New York gave the Russian fleet a ticker-tape parade in 1863...an Arctic ordeal. **(034)**

AUGUST 1960—Robert L. Heilbroner's portrait of steelmaster Andrew Carnegie...an unorthodox view of rural America...the real faces of the wild west. **(035)**

OCTOBER 1960—The Chicago Columbian Exposition of 1893, in color...Quantrill, the ruthless guerilla whose Kansas raids in 1863 became legend...the days when billions of locusts plagued the plains. **(036)**

FEBRUARY 1961—The real story of the Alamo ...John Holland, father of the submarine ...General Wm. Mitchell's account of the first Alaskan telegraph. **(038)**

APRIL 1961—A Briton re-examines the American Revolution...Samuel F. B. Morse, a 14-page color portfolio...a portrayal of Lincoln by his telegrapher. **(039)**

JUNE 1961—Mari Sandoz on "Dakota Country"..."The Passing of the Passenger Pigeon"...the Yalta Conference..."When Rubber Checks Didn't Bounce." **(040)**

AUGUST 1961—Lord of San Simeon: William Randolph Hearst...volcanic destruction of Martinique...Billy Sunday...Mark Twain embarrasses Winston Churchill. **(041)**

OCTOBER 1961—The guiding light of the gridiron, Walter Camp . . . a behind-the-scenes account of "Fiorello's Finest Hour" ...Cornwallis at Yorktown. **(042)**

DECEMBER 1961—"Bryan" by John A. Garraty ...the personal scrapbook of P. T. Barnum ...Washington Irving, "The Sunny Master of Sunnyside"...a rare daguerreotype of an aging Andrew Jackson...Peter Stuyvesant and his men in an 11" x 33" print. **(043)**

FEBRUARY 1962—How the U.S. Marines captured Guantanamo Bay...the man who planted the George Washington cherry tree legend..."The Face of Maine." **(044)**

APRIL 1962—Hemingway with the Paris liberation army...Peary vs. Cook: "Who Discovered the North Pole?"...the exploits of sharpshooter Annie Oakley. **(045)**

JUNE 1962—Startling new evidence in the Sacco-Vanzetti case...Black Jack Pershing's wild goose chase...Francis Biddle on the World War II cabinet. **(046)**

AUGUST 1962—The dirtiest Presidential campaign...the private lives of the first Siamese Twins...how the soda fountain began... Benjamin Latrobe portfolio. **(047)**

OCTOBER 1962—"The Electoral College" and why it fails...Booker T. Washington...a vision that began Mormonism...did the Pilgrims land on Plymouth Rock? **(048)**

DECEMBER 1962—"Gold!"—the '49ers who mined and died for it...the struggle for Henry Ford's empire... the death of Mormon prophet Joseph Smith. **(049)**

JUNE 1963—"The Supreme Court," and its profound impact on American life... the 1932 "Bonus March"... "Bloody Belleau Wood"

by Laurence Stallings . . . "Phantom Cities"..."The Day Jefferson Got Plastered." (052)

AUGUST 1963 — An on-the-spot report of the great Chicago Fire . . . Colonel House's rift with President Wilson . . . Justice Marshall's Dartmouth College decision. (053)

OCTOBER 1963 — The truth behind the story of Washington praying at Valley Forge...a nostalgic glimpse of a cowboy's life..."Old Abe," the only veteran of the Civil War to be stuffed and mounted...is John Henry man or myth?..."The Strike That Made a President." (054)

DECEMBER 1963—Dred Scott decision..."Vice vs. Virtue"...Coolidge's lamplight inauguration...a collection of turn-of-the-century theatre posters. (055)

FEBRUARY 1964—"On History," by John F. Kennedy..."The Great White Fleet"... Mason & Dixon, their line and its legend... the Johnson-Jeffries bout. (056)

APRIL 1964—Maximilian and Carlota, France's puppet monarchs on the shaky throne of Mexico...the mystery of Lizzie Borden..."The Birth of Jim Crow." (057)

JUNE 1964—The Coatesville, Pa., lynching, by Eric F. Goldman...Sitting Bull and his mystic Ghost Dance...the *first* (not the famous) flag-raising on Iwo Jima..."The Thundering Water," by Bruce Catton. (058)

AUGUST 1964—Special Issue: *The Presidency* Richard Rovere on the nature of the highest office...great moments of Presidential decision...White House photos from Polk to present...a gallery of First Ladies. (059)

OCTOBER 1964—The scrimshaw collection of John F. Kennedy...early photographs of the frontier..."The American Bluebeard," who went through 43 wives and their fortunes...Jefferson the Gourmet..."Coast to Coast in Twelve Crashes." (060)

DECEMBER 1964—"Why Washington Stood Up In The Boat"...Robert L. Heilbroner reveals how Rockefeller built his fortune... a portrait of L. Frank Baum, "The Father of the Wizard of Oz." (061)

FEBRUARY 1965—The scandal of "The Harding Papers"...Pike and his peak...an eyewitness account of the sinking of the *Eastland*...Brigham Young's last wife. (062)

JUNE 1965—The discovery of a great historical painting, *Washington at Monmouth* (companion to *Washington Crossing the Delaware*)...Walter Lord on the history of civil rights in Mississippi...a veteran of Bull Run tells of the battle. (064)

AUGUST 1965—Special Issue: *The Twenties*—the Valentino funeral...the oil scandal at Teapot Dome...a John Held, Jr., portfolio ...the heyday of the KKK...Babe Ruth... "Great Photographs of the Decade." (065)

OCTOBER 1965—An important discovery: the oldest known map of the New World (1440) ...the Wyeth family of fine painters, with a portfolio of 20 paintings in color . . . an American revolutionary spy..."History As a Judge," by Henry Steele Commager. (066)

DECEMBER 1965—"Canada," an essay by Hugh MacLennan with a 45-page picture portfolio in color..,"The Day The Balloon Came To Town," by Murry Falkner (brother of Nobel-novelist William)...how scrappy Sam Houston's last fight for the Presidency was foiled...a history of Burma-Shave signs. (067)

FEBRUARY 1966—"Audubon In The Original" ...the questionable career of Aaron Burr, by John Dos Passos...a memoir of Guadal-

canal, "I've Served My Time In Hell"... the unveiling of Miss Liberty... the growth of the whisker fashion. (068)

APRIL 1966—"Was America Discovered By A Fifth-Century Chinese Priest?"... the Vanderbilt family and their scramble for the Commodore's $100 million... the story of Lucy Flucker, whose extravagant tastes matched those of her famous husband, Henry Knox... the heyday of the interurban... Ned Buntline. (069)

JUNE 1966—An evaluation of "The Place of Franklin D. Roosevelt In History," by Allan Nevins... the terror-filled story of the Johnstown flood... an eyewitness account of the death of John Wilkes Booth. (070)

AUGUST 1966—The high-flying adventures of "Carlotta, The Lady Aeronaut"... Hanson W. Baldwin on "The Fall of Corregidor" ...the flamboyant Long family of Louisiana ...how John Henry Patterson invented modern salesmanship. (071)

OCTOBER 1966—Louis Auchincloss presents a gallery of "New York's First Families"... a portfolio of rare paintings show what Jewish immigrants to America left behind... the day Benedict Arnold fought the first fleet action of the Revolution. (072)

PRICES: 1954-1956, *Out of Print*
1957-1960, *$5.95 per issue*
1961-1962, *$4.95 per issue*
1963-1966, *$3.95 per issue*

AMERICAN HERITAGE INDEXES

An index transforms a year of AMERICAN HERITAGE into a fine history reference shelf. Each 26-page *Annual Index* is the same page size as the magazine and lists alphabetically all places, names, titles, subjects, and authors in six issues. A cross index lists all pictures by subject, artist, and title.

The Ten Year Index (December 1954-October 1964) is a 200-page, hard-cover volume with more than 30,000 entries.

Dec. 1954-Oct. 1955	Vol. VI	(552)
Dec. 1955-Oct. 1956	Vol. VII	(553)
Dec. 1956-Oct. 1957	Vol. VIII	(554)
Dec. 1957-Oct. 1958	Vol. IX	(555)
Dec. 1958-Oct. 1959	Vol. X	(556)
Dec. 1959-Oct. 1960	Vol. XI	(557)
Dec. 1960-Oct. 1961	Vol. XII	(558)
Dec. 1961-Oct. 1962	Vol. XIII	(559)
Dec. 1962-Oct. 1963	Vol. XIV	(560)
Dec. 1963-Oct. 1964	Vol. XV	(561)
Dec. 1964-Oct. 1965	Vol. XVI	(562)
Dec. 1965-Oct. 1966	Vol. XVII	(563)*

Five Year Index (Dec. 1954-Oct. 1959) (550)
TEN YEAR INDEX (Dec. 1954-Oct. 1964) (551)

**Available Spring 1967*

PRICES: ANNUAL INDEXES $1 EACH • FIVE YEAR INDEX, $3 • TEN YEAR INDEX, $5

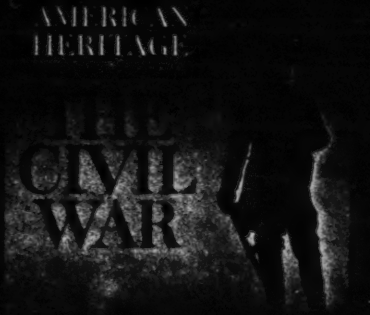
AMERICAN HERITAGE

GREAT
HISTORIC
PLACES

AMERICAN HERITAGE BOOKS

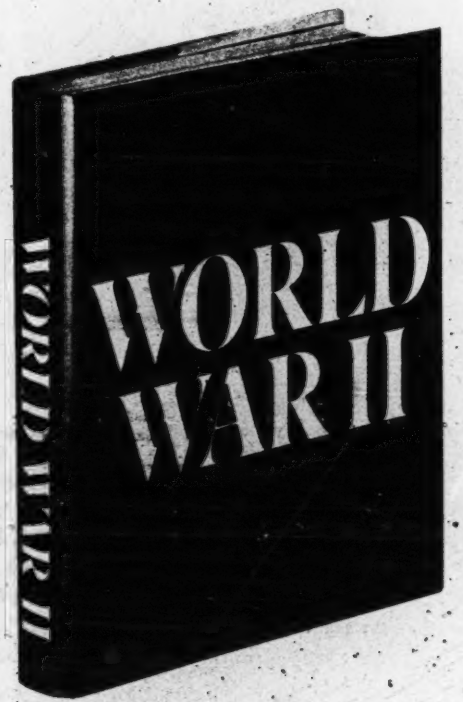
THE
PIONEER
SPIRIT

INDIANS



THE AMERICAN HERITAGE
PICTURE HISTORY OF

WORLD WAR II



This remarkable "best seller" is the largest, most inclusive single-volume picture history of World War II ever published. It covers the sweep, the drama, and the tragedy of that global cataclysm with the immediacy and impact that only great pictures can evoke.

The book is designed to convey a balanced understanding of the complex, scattered events of those momentous years, from the war's origin in 1919 to its murky aftermath. The story unfolds in an unparalleled succession of great photographs and pictures and their succinct captions, and in the running narrative of *C. L. Sulzberger*, the authoritative and skilled journalist who saw much of the war at first hand and was personally acquainted with many of its leading characters.

In addition, the book is highlighted by quotations from men and women who recorded the historic actions they witnessed.

The big, 640-page volume (8½" by 11") contains 725 pictures, including 140 that have never been published in this country.

The DE LUXE EDITION divides the book into two volumes, both bound in extra-heavy buckram, boxed in a handsome slip-case. A 40-page *Chronology of World War II*, inserted between the two volumes, lists important wartime events, and provides pertinent notes on all principal government and military leaders.

EXTRA: The American Heritage LP Record *Historic Voices and Music from World War II.* A Robert Lewis Shayon production.

640 Pages Regular Edition $19.95 De Luxe Edition $24.95

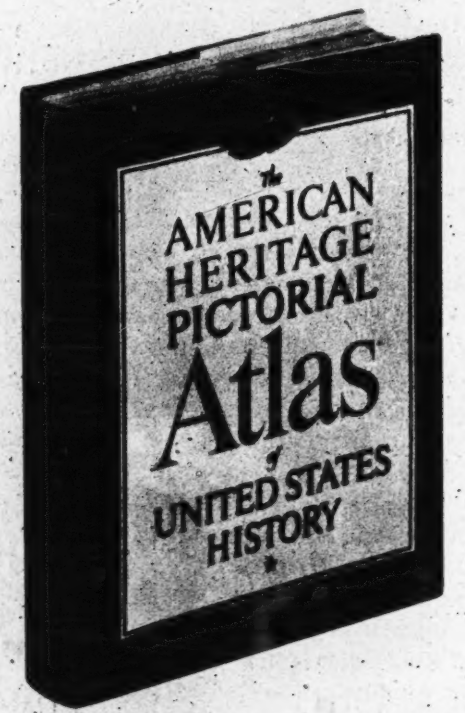
READERS' PRICE: $15.95 (427) • DE LUXE EDITION: $20.95 (428)

Record is available only with WORLD WAR II book: ADD $3.50 (429)

THE
AMERICAN HERITAGE PICTORIAL

ATLAS

OF UNITED STATES HISTORY



This is the first thoroughgoing American historical atlas to be published since 1932, the first ever to be designed for reading as well as reference.

It is a *history* of America made newly exciting by the modern use of cartography. It is an *atlas* made eminently attractive and informative by means of many historical pictures, extensive use of color, and a running narrative of some 60,000 words. This narrative is the work of five well-known historical journalists: Roger Butterfield, Bruce Catton, John A. Garraty, Alvin M. Josephy, Jr., and Stephen W. Sears.

Two hundred and ten new maps graphically position, identify, and clarify important chapters of the American story, from the last glacial epoch in North America to the U.S. involvement in Vietnam. In addition, many of the new maps present a variety of political and socioeconomic data.

Other features include: period illustrations that give visual reality to specific times and places; color portfolios showing remarkably detailed views of American Revolution and Civil War battles, and America's natural wonders; mid-19th-century city views.

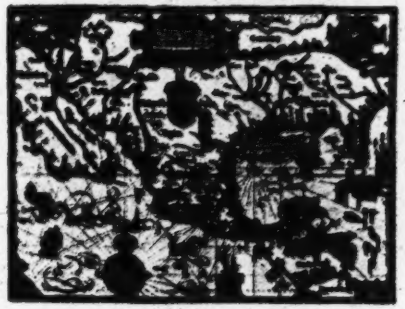
432 Pages Regular Edition $16.50 De Luxe Edition $19.00

READERS' PRICE: $12.95 (430) • DE LUXE EDITION: $15.45 (431)

The De Luxe Edition is boxed, bound in heavy maroon buckram.

FAMOUS EARLY

MAPS OF AMERICA



These color gravure reproductions cover almost 300 years of exploration.

Size: 1½ by 2 feet. Heavy paper. Mailed in a tube. Story of each map on its back.

READERS' PRICE: $2 EACH

A MARINER'S GUIDE TO THE NEW WORLD, ca. 1546. A view of the Spanish Main. **(504)**

THE KNOWN GLOBE—1667, by Pieter Goos. An ornate 17th-century world map. **(505)**

THE NEW NETHERLANDS AND NEW ENGLAND—1635, by the great Willem Blaeu. **(506)**

THE NEW WORLD—1600, by Gabriel Tatton. A map of a century of discovery. **(507)**

NEW FRANCE—1745, by Reiner Ottens. The French Empire in America. **(508)**

THE FIRST AMERICAN MAP OF THE UNITED STATES, by Abel Buell, 1784. **(509)**

THE ORIGINAL
WATER-COLOR PAINTINGS BY
JOHN JAMES

AUDUBON

FOR THE BIRDS OF AMERICA

This matchless two-volume, 852-page work reproduces, in superb color and for the *first* time, all of John James Audubon's *original* paintings for his masterwork, "The Birds of America." (The long-popular "Audubon prints" have all been copied from the first printed version by the English engraver, Robert Havell.) The originals have been kept by The New-York Historical Society, who purchased them from Audubon's widow in 1863.

The 7,500-word introduction is by Marshall B. Davidson, Audubon authority and Senior Editor of HORIZON.

The captions for each plate appear opposite the pictures or on the preceding pages. The editors frequently use Audubon's own words from his "Ornithological Biography," and each picture is thoroughly annotated.

Three front-rank authorities in the fields of art history, botany, and ornithology have served as consultants:

Edward H. Dwight, Director of the Museum of Art, Munson-Williams-Proctor Institute, Utica, New York, has made the most thorough study to date of Audubon's originals.

Dr. Harold W. Rickett, Senior Botanist, The New York Botanical Gardens, has given the common and scientific names to every identifiable plant and flower.

Dr. Dean Amadon, President of the American Ornithologists Union, has updated and, where required, corrected Audubon's identifications.

There are 431 color reproductions on the book's 852 pages. Only 57 pages carry two prints; there are 256 full-page prints, and 64 that cover two pages, many of them "gatefolds." The acid-free paper was especially made for this one edition. It will not deteriorate for several centuries.

The matched volumes are bound in rich Osnaburg buckram cloth, stamped in gold, and housed in a slipcase with a Cockerell paper design. Size: 10⅛" x 13¼". Weight: 14 pounds. Indexed.

852 Pages Retail Price $75

READERS' PRICE: $55 (424)

THE AMERICAN HERITAGE HISTORY OF

WORLD WAR I

"The Great War" claimed 10,000,000 lives, wounded 20,000,000, and radically changed the world. Here is the record of those earth-shaking years in one authoritative volume. There are 384 pages, 300 pictures (66 in color), and 66 battle maps. The narrative is by General S. L. A. Marshall. *The New York Times Book Review:* "This fine text and picture history is the best of its kind so far, and I doubt very much that anyone is going to top it."

EXTRA: The American Heritage LP Record *World War I, Historic Music and Voices,* narrated by Charles Collingwood.

384 Pages *Regular Edition $16.50* *De Luxe Edition $19.00*

READERS' PRICE: $12.95 (415) • DE LUXE EDITION: $15.45 (416)

Record is available only with World War I book: ADD $3.50 (417)

THE AMERICAN HERITAGE
PICTURE HISTORY OF

THE CIVIL WAR

THE CIVIL WAR is the first illustrated history to receive a Pulitzer Prize. Bruce Catton, the most honored Civil War historian, wrote the narrative, which covers military, political, social, and economic history of the war.

This massive volume contains 160,000 words and 836 illustrations, 266 in color. Size: 9" x 11¼". Indexed.

The DE LUXE EDITION, two volumes bound in extra-heavy maroon buckram and boxed in a slipcase, has a separate 40-page *Chronology of The Civil War.*

The New York Times: "A full picture history of the war in one triumphant collection... unquestionably a work of imposing stature."

632 Pages Regular Edition $19.95 De Luxe Edition $25.00

READERS' PRICE: $14.95 (407) • DE LUXE EDITION: $19.95 (408)

THE AMERICAN HERITAGE BOOK OF

INDIANS

This spectacularly illustrated history of the only native Americans tells the story whole and in perspective, from pre-historic times to the present. The author, William Brandon, and the editor, Alvin M. Josephy, Jr., are both leading authorities on the American Indian.

The introduction is by John Fitzgerald Kennedy.

Size: 8½" x 11". The 500 illustrations, 125 in color, include photographs, early maps, and Indian art and artifacts.

New York Herald Tribune: "Nothing comparable to it in the literature of the American Indian."

416 Pages *Regular Edition $15.00* *De Luxe Edition $17.00*

READERS' PRICE: $11.95 (409) • DE LUXE EDITION: $13.95 (410)

The De Luxe Edition is boxed, bound in heavy maroon buckram.

THE AMERICAN HERITAGE
HISTORY OF

THE GREAT WEST

THE GREAT WEST presents, as no single volume has ever done before, the year by year progress of America's epic westward surge between 1763 and 1914. Events are related to each other and to the larger context of national and world history.

The cast of characters is as colorful as any nation can boast —from Long Hunter Daniel Boone to "Cattle Kate" Watson. The book measures 8½" x 11", with 416 pages and 458 illustrations, 113 in color—many never before published.

The New York Times: "...soundly researched, well written, and illustrated."

EXTRA: The American Heritage LP Record *Historic Music of The Great West*. Narrated by Richard Boone.

416 Pages - Regular Edition $16.50 De Luxe Edition $19.00

READERS' PRICE: $12.95 (421) • DE LUXE EDITION: $15.45 (422)

Record is available only with GREAT WEST book: ADD $3.50 (423)

THE AMERICAN HERITAGE BOOK OF GREAT HISTORIC PLACES

The nearly 3,000 historic sites described, with maps and concise directions, provide a guide for "The Grand Tour" of American history. There are 700 illustrations, 154 in color. Indexed.

376 Pages *Regular Edition $12.50* *De Luxe Edition $14.50*

READERS' PRICE: $9.95 (401) • DE LUXE EDITION: $11.95 (402)

The De Luxe Edition is boxed, bound in heavy maroon buckram.

THE AMERICAN HERITAGE BOOK OF NATURAL WONDERS

Here is the history of our country told in terms of the land. Eight authors include Justice William O. Douglas and Bruce Catton. 300 illustrations, over 100 in color. Indexed.

384 Pages *Regular Edition $16.50* *De Luxe Edition $19.00*

READERS' PRICE: $12.95 (413) • DE LUXE EDITION: $15.45 (414)

The De Luxe Edition is boxed, bound in heavy maroon buckram.

THE AMERICAN HERITAGE HISTORY OF

FLIGHT

Our HISTORY OF FLIGHT chronicles the conquest of the air, from the myths of pre-history to the edge of space. As history goes, flight has everything—roots in the past, heroes, cranks, geniuses, and ultimate triumph. Much of it is American history, much of the record is pictorial.

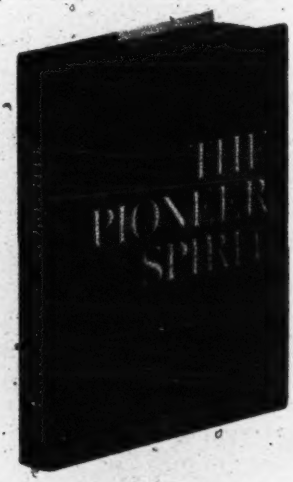
The 70,000-word narrative is by Arthur Gordon. There are 450 pictures (about 100 in color). C. H. Gibbs-Smith, Victoria and Albert Museum; and Marvin W. McFarland, Library of Congress Aeronautics Division, acted as consultants.

The introduction is by Generals Carl Spaatz and Ira C. Eaker. The Editor-in-charge is Alvin M. Josephy, Jr. Indexed.

416 Pages *Regular Edition $15.00* *De Luxe Edition $17.50*

READERS' PRICE: $11.95 (411) • DE LUXE EDITION: $14.45 (412)

The De Luxe Edition is boxed, bound in heavy maroon buckram.



THE AMERICAN HERITAGE BOOK OF

THE PIONEER SPIRIT

The peculiarly American trait we have come to label "the pioneer spirit" has not been limited to the westward journey. It has infused every facet of our history and national life.

This large volume examines the growth of the spirit through the lives of men and women who personify it. There are four authors: Dr. Allan Nevins, Peter Lyon, Alvin M. Josephy, Jr., and Francis Russell.

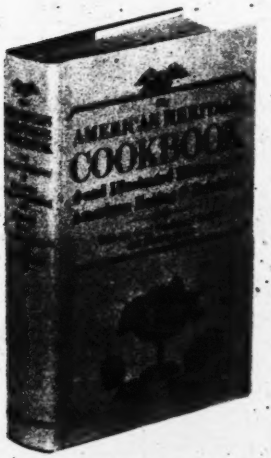
THE PIONEER SPIRIT measures 8½ by 11 inches, with 480 illustrations, 150 of them in excellent color.

The New York Times Book Review: "...a history of our people that is both joyful to the spirit and compelling to the eye."

400 Pages *Regular Edition $12.95* *De Luxe Edition $14.95*

READERS' PRICE: $9.95 (405) • DE LUXE EDITION: $11.85 (406)

The De Luxe Edition is boxed, bound in heavy maroon buckram.



THE AMERICAN HERITAGE
COOKBOOK
AND ILLUSTRATED HISTORY OF AMERICAN EATING & DRINKING

There has never before been a cookbook like this one. The lively anecdotal historical chapters in Part I give the full flavor of American eating and drinking—customs, dishes, and taste-setters over the centuries.

Part II contains 500 superb American recipes and 30 historic menus. There are more than 350 illustrations, 65 in color.

Contributors include Cleveland Amory, Lucius Beebe, Paul Engle, Marshall Fishwick, Russell Lynes, Gerald Carson.

Size: 6¾ by 9½ inches, 640 pages in all.

A two-volume DE LUXE EDITION is bound in heavy buckram and boxed in a handsome slipcase. Volume I: the history. Volume II: the recipes and menus.

640 Pages Regular Edition $12.50 De Luxe Edition $15.00

READERS' PRICE: $9.95 (418) • DE LUXE EDITION: $12.45 (419)

READERS' PRICE: $2.00 (708)

FOUR DAYS

THE HISTORICAL RECORD OF THE DEATH OF PRESIDENT KENNEDY

"Four Days is a restrained, well-designed, very moving account of the death of President Kennedy and the events, tragic, formal, and bizarre, that followed." *The Atlantic*

Size: 8¾ x 11¼ inches, 144 pages, more than 140 illustrations, 15 in color. Created with United Press International. 2,500,000 copies sold.

READERS' PRICE: $2.00 (712)

CHURCHILL

THE LIFE TRIUMPHANT

This handsome volume, with an introduction by Dwight D. Eisenhower, is an authoritative pictorial record and brief biography of the most famous man of our age.

Narrative by Henry Anatole Grunwald; hard covers, 8¾" x 11¼"; 144 pages; 152 pictures, 32 in color; and 32-page document section. Created with United Press International.

HORIZON

"The magazine that says what civilization is" first appeared in *September, 1958.* Its field is world civilization—the history of many cultures over many centuries. The dozen or more articles in each issue are devoted to archaeology, the fine and lively arts, philosophy, letters, manners, and great men and eras of the past. Among the magazine's contributors are many of today's leading scholars, critics, and authors: Morris Bishop, H. R. Trevor-Roper, Arnold Toynbee, Gilbert Highet, Arthur Koestler, John Canaday, M. I. Finley, Robert Graves, Compton Mackenzie, J. B. Priestley, Loren Eiseley....

HORIZON's format is lasting: hard covers, no advertising. In every issue there are about 100 illustrations, a third or more in superbly reproduced color. The magazine measures 9¼" by 12¼", and contains 120 pages.

HORIZON is published quarterly, in January, April, July, and October. (From 1958 through 1963 it appeared bimonthly.)

PRICES: *$5 a copy, $16 a year (four issues)*
Code number for your own subscription order **(1001)***
Code number for gift subscription order **(2001)***

* (If you are now a subscriber, please *do not* use the Sundry form to order Christmas gifts or to renew your own subscription. Special forms will be mailed to you.)

BACK ISSUES OF HORIZON

SEPTEMBER 1958—Out of Print

NOVEMBER 1958—André Malraux on "The Gods in Art"... G.B.S.... Robert Frost... Joseph Wechsberg's guide to great opera houses... underwater archaeology... Peter Ustinov... The Noble Houses of 18th-Century England. **(201)**

JANUARY 1959—"The Flowering of San Francisco"...Somerset Maugham "On Having My Portrait Painted"...machine-made music...Hemingway interview...P. G. Wodehouse's vanishing world. **(202)**

MARCH 1959—"Misuses of the Past" by Herbert Muller...engineer-architect Pier Luigi Nervi..."The Two Worlds of Alexander"...Joan Miró...The Greatest Wit in England, by Hesketh Pearson..."Ruth Orkin's New York"...the fine art of forgery. **(203)**

MAY 1959—Out of Print

JULY 1959—Out of Print

SEPTEMBER 1959—Out of Print

NOVEMBER 1959—"The Bible as Divining Rod"...the wreck of the status system... H. R. Trevor-Roper on "The Persecution of Witches"...the writer as the conscience of France..."Olivetti." **(207)**

JANUARY 1960—James Ramsey Ullman's "Dream of the South Seas"...new American opera..."Picasso's Lady" by David Douglas Duncan..."Thucydides' War"... Walter Kerr "In Search of Shylock"..."The Pleasures of the Bastille." **(208)**

MARCH 1960—The New London youth of Eugene O'Neill... John Canaday on 19th-century Salon art... E. Power Biggs on the organ revival..."Philo-Semitism"..."A Comic History of England." **(209)**

MAY 1960—"In Search of the Etruscans"... France's New Wave of movie makers... "The Childhood Pattern of Genius"... America's cultural image abroad... Japanese wood block prints... the Housatonic Valley's gifted residents. **(210)**

JULY 1960—Out of Print

SEPTEMBER 1960—Out of Print

NOVEMBER 1960—"The Innocent Amusements of Jean Anouilh"... Henry

Moore..."An Iconography of Heavenly Beings"...Hugh MacLennan on "The Rout of Classical Tradition" in education ...William Butler Yeats. **(213)**

JANUARY 1961—Toynbee on "The Historian's Struggle with Religion"...Chinese Imperial art treasures... Mad King Ludwig's dream castles... Tyrone Guthrie on "Greatness in the Theatre"...Homer's Age of Heroes. **(214)**

MARCH 1961—Arthur Koestler examines the impact of the West on traditional Japan ...Nicolas Poussin, precursor of modern art...Corbusier's Cloister...Knights of the Maltese Cross...Leontyne Price. **(215)**

MAY 1961—"The Romantic Revolt" by Harold Nicolson...an interview with Eugene Ionesco...Max Beerbohm's practical jokes..."The Ugly America"...abstract art in modern Poland..."Escoffier: God of the Gastronomes." **(216)**

JULY 1961—Lewis Mumford on "The City in History"...King Charles I, "The Prince of Patrons"...Emily Dickinson's love poems... Provincetown...Biblical paintings by an Israeli primitive artist...a scientist questions "The Dream of Reason." **(217)**

SEPTEMBER 1961—"Andrew Wyeth"... Jean Louis Barrault explains "Why the French Need Shakespeare"..."Sicily"...Op Art... Rudolf Serkin "The Complete Musician" ..."The Kennedy Look in the Arts"...a tour of magnificent Blenheim Palace ... powerful Romanesque sculpture. **(218)**

NOVEMBER 1961—Picasso and his public... "The Bauhaus"... Jules Feiffer's first play ...Nancy Mitford on Parisian *salons*... "The New Face of Britain" in photographs ..."The Two Spains of Don Quixote"... "The Illumination of Jean Fouguet." **(219)**

JANUARY 1962—Vatican art treasures with Skira portfolio...Robert Graves...Harold C. Schonberg on chess...an interview with Glenn Gould..."The Disappearance of Don Juan"..."The Social Consequences of Communications Satellites." **(220)**

MARCH 1962—Pompeii ...Ronald Searle's Paris sketchbook... history's judgment of Joan of Arc..."The Simple Seer: Pierre Bonnard"... Joseph Wechsberg on Joseph Haydn..."John Updike," by Richard W. Murphy...a portrait of Sir Thomas Beecham. **(221)**

MAY 1962—Britain's Royal Academy... "The Worlds of Robert Sherwood"... Erasmus... Bertolt Brecht, "The Man in the Ironic Mask"... "Water: the Wine of Architecture"...critics try to classify J. D. Salinger. **(222)**

JULY 1962—The river Seine in art and history...New York's Lincoln Center...the viciously witty circle at the Algonquin Round Table..."Dostoevsky With a Japanese Camera"..."Alfred Kazin: The Critic as Creator." **(223)**

SEPTEMBER 1962—"When Islam Ruled Iberia"...the revival of the art of stained glass...Brian Brake photographs the "China of the Chinese"..."Architect's Hero: Louis Kahn"...Walter Kerr denounces avant-garde theatre...Australian painter Sidney Nolan. **(224)**

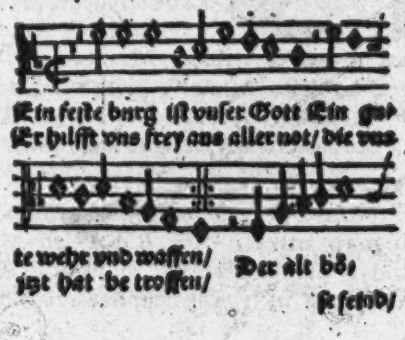
NOVEMBER 1962—The art of Alexander Calder ...chamber music: "The Music of Friends" ...a color portfolio of Rouault's Passion Pictures...behind the scenes at Sotheby's... today's church architecture...George IV's exotic extravaganza at Brighton. **(225)**

JANUARY 1963—"The Most Mysterious Manuscript"..."What's Next in Art?"...England's young playwrights..."Twenty-Five Centuries of Persia"...Pascal...Claudia Cardinale. **(226)**

MARCH 1963—Venice: a color gravure portfolio:..the MacDowell Colony...the rich cultural history of Africa...the sylvan scenes of Petworth by J. M. W. Turner... Robert Graves on "The Poet in a Valley of Dry Bones"..."Bowling Goes Bourgeois," ...Louis Kronenberger asks "Whatever Became of Personal Ethics?" **(227)**

MAY 1963—Baron Haussmann, "The Man Who Destroyed Paris" (and rebuilt it)... "The New Look in Valhalla," by Joseph Wechsberg...a report on LSD: "Can This Drug Enlarge Man's Mind?"...William K. Zinsser on his famous East Hampton neighbors...Hadrian's Villa...a glittering portfolio of crowns. **(228)**

JULY 1963—The British Royal Collection of Paintings: a color portfolio...Francis Russell on "Sheiks and Shebas Dance No More" ...Philadelphia, plain and fancy...Lincoln Barnett on "What Are We Doing To Our Language?"... the many faces of Orson



Welles... the great naval battle of Lepanto by Oliver Warner. (229)

SEPTEMBER 1963—John Canaday goes "Back to the Nude"... imaginary architecture... film-maker Vittorio de Sica tells "How They Live and Die in Naples"... the truth about the H.M.S. *Bounty*... color pictures of "The Eternal Dance of India"... "A diller, a dollar, a very expensive scholar," by Jacques Barzun. (230)

NOVEMBER 1963—A comprehensive survey of the opulent "World of Byzantium," with its art treasures and mosaics in color... the oldest gods... Arthur Clarke on the life and death of the sun... the home of a "fantastic" architect... "Poker and American Character." (231)

WINTER 1964—"Henry Fielding: The Journey through Gin Lane" by J. H. Plumb ...Malcolm X and the Black Muslims... Adah Menken, "The Naked Lady"... "Manet" (with an 8-page color portfolio) by John Canaday... "The Rock Monasteries of Cappadocia." (232)

SPRING 1964—"Four Faces of Heresy" by H. R. Trevor-Roper... The Rhine, with a 42-inch map insert... "In B-d With Mrs. Grundy," by Peter Fryer... an appraisal of Jane Austen by J. Christopher Herold... "Lucretius" by Gilbert Highet... The Barnes Collection. (233)

SUMMER 1964—The brilliant, prophetic, neurotic "Jean-Jacques Rousseau"... "Pre-Columbian Art" with a Skira gravure portfolio... Cleveland Amory on Diamond Jim Brady... an appraisal of Charles Dickens' prolific genius... "The King's Trial," by C. V. Wedgwood... "Science Poetry"... "Sarajevo: The End of Innocence." (234)

AUTUMN 1964—Rudyard Kipling," by C. E. Carrington with Brian Brake's color photos of Kipling's India... "Re-uses of the Past" by Jotham Johnson... the splendid art of Philadelphia's Thomas Eakins... breakfast with Oscar Wilde... the private world of Henry David Thoreau... "The Wit of Pope John XXIII." (235)

WINTER 1965—V. S. Pritchett on Daniel Defoe —imposter, spy, and "father of the English novel"... "The Pleasures of Bath"... "Picasso" by John Canaday (illustrated in color)... "The Aesthetics of Snobbery" by Arthur Koestler... Thurber draws Shakespeare... "The Miracle of the Mollusk," photographs by Hiro. (236)

SPRING 1965—How Jerusalem has remained "The Holy City"... "The Celts," a warrior tribe whose treasures of gold have only recently been unearthed... a profile of Theodore Dreiser... the strange customs that surround Bangkok's "Palace in the Sun"... the royal wizard of Tibet. (237)

SUMMER 1965—John Canaday compares the explosive humanism of Giotto with the refined elegance of Duccio... Dante, aristocrat forced into the role of beggar and parasite... "A Way of Seeing" by James Agee... The Alhambra... "Richelieu," by C. V. Wedgwood. (238)

AUTUMN 1965—A personal memoir of T. S. Eliot by Francis Russell... "The House of Lords"... ancient Ceylon in color... "American vs. European Art"... Ireland, with photographs by Henri Cartier-Bresson, text by Lord Kilbraken... a portfolio of posters from *La Belle Epoque*... the Vanderbilt "Marble Cottages" at Newport, by Mary Cable. (239)

WINTER 1966—"Masada," Herod's pleasure dome recently unearthed by an expedition led by Yigal Yadin... the art collections of Frick, Morgan, Widener, and Mellon and how they've fared with the Internal Reve-

nue Service...a lovable man of genius: H. G. Wells...the mystique of the Rolls-Royce, by Lucius Beebe..."The Flowering of Flemish Art," with a color gravure portfolio...El Escorial: The King's Prayer Factory"...how to drive in Europe. (240)

SPRING 1966—Out of Print

SUMMER 1966—"Whatever has Become of Mommy?" by Agnes de Mille...a pictorial essay on the Nile, with text by Lord Kinross ..."Watteau's Forbidden World"..., the Hudson Institute, "Where They Think About the Unthinkable"...Classic Comics in modern Greek...Maria Theresa, who countered her husband's dalliance with a "chastity police." (242)

AUTUMN 1966—Catherine The Great and her lavish tour of Russia, engineered by Gregory Potemkin...Roger Starr makes a convincing case for conservation...a savage portrait of William the Conqueror, by Morris Bishop..."Turkish Delights," a collection of oriental miniatures..."Monet's Revenge" by Peter Schneider...a recently discovered manuscript reveals the truth about the sensual life of the original "Casanova." (243)

PRICES: 1958-1963—*$4.50 per issue*
1964-1966—*$5.00 per issue*

HORIZON INDEXES

The eminent critic John Mason Brown has reported that he is "dazzled and delighted at the range of subjects covered in HORIZON." The Index is a useful guide to those subjects, and a map of HORIZON's wide-ranging exploration of the long cultural adventure of modern man.

Both the 24-page *Annual Indexes* and the 96-page *Five Year Index* list articles by subject, author, names, and places; and every picture by subject, artist, and title.

The *Annual Indexes* are slightly smaller than the magazine, bound in soft covers, and fit easily between issues. The *Five Year Index* is the same size as HORIZON and comes bound in gold stamped hard covers.

Sept. 1958-July 1959	Vol. I	(575)
Sept. 1959-July 1960	Vol. II	(576)
Sept. 1960-July 1961	Vol. III	(577)
Sept. 1961-July 1962	Vol. IV	(578)
Sept. 1962-Nov. 1963	Vol. V	(579)
Winter 1964-Autumn 1964	Vol. VI	(580)
Winter 1965-Autumn 1965	Vol. VII	(581)
Winter 1966-Autumn 1966	Vol. VIII	(582)*

**Available Spring 1967*

FIVE YEAR INDEX (Sept. 1958 through Nov. 1963) (574)

PRICES: ANNUAL INDEXES, $1 EACH · FIVE YEAR INDEX, $3

HORIZON BOOKS

THE HORIZON BOOK OF

ANCIENT ROME

In the sheer scope and endurance of its power, the Roman epoch is unsurpassed in history. Our own time is much in debt to its great legacy to Western civilization—in law, language, and the art of government.

THE HORIZON BOOK OF ANCIENT ROME is an intelligent, remarkably handsome survey of that important history and heritage. The eminent author, Robert Payne, describes the 12-century course of Rome's rise, reign, and collapse with skill and vitality. The 350 illustrations (more than 80 in color) represent the broadest collection ever assembled in a single book on ancient Rome. They afford a splendid panorama of the Roman world: lands, ships, architecture, weapons, frescoes, dress, furnishings, coins, jewelry, and wonderfully strong and realistic Roman portrait sculpture. Illustrations accompany the text and also appear in 13 supplementary picture portfolios.

Three 16-page literary anthologies present excerpts, in the best modern English translations, from the works of Vergil, Cicero, Catullus, Ovid, Livy, Tacitus, Lucretius, Caesar, Plautus, Pliny, and other great Roman writers and orators.

There is a helpful chronology, a review of our Roman legacy in law, many colorful maps, and a bibliography.

Published in fall, 1966, the volume measures 9¼" by 12¼". Indexed.

ROMAN TRULLA

An exact reproduction of a unique first century B.C. pitcher, 2¼" high. The "trulla" may have been used as a sauceboat, or for ladling wine. The original is owned by the Metropolitan Museum of Art in New York. With the Museum's cooperation, this precise reproduction, in silver plate on heavy brass, was executed for HORIZON by The Gorham Company.

416 Pages Regular Edition $18.95 De Luxe Edition $21.95

READERS' PRICE: $14.95 (461) • DE LUXE EDITION: $17.95 (462)

The De Luxe Edition is boxed, covered in heavy embossed buckram.

ROMAN TRULLA: $19.95 (463)

Canadian Buyers: The Canadian Customs and Excise Bureau requires a 38% Customs and Excise Duty on imported silver. Duty will be collected by Canadian Customs on delivery.

THE HORIZON BOOK OF

ANCIENT GREECE

The greatness of Greece and her consummate legacy to the civilization we know are here set forth in a single comprehensive, superbly illustrated volume—one which surveys the whole epic of ancient Greece from its forerunners in the Bronze Age cultures of Crete and Mycenae to its lasting legacy.

Readers already versed in one or more aspects of Greek civilization will find it an authoritative and handsome compendium of Hellenic life. Those who would welcome an all-around introduction to the subject will find this book is just that.

The author and editor in charge is William Harlan Hale, biographer, historian, and former editor of HORIZON and *The Reporter* magazines. Over 360 pictures—about a fourth in color—accompany the narrative and are also grouped in 11 supplementary picture portfolios.

In addition, there are anthologies—from the best modern translations—of the great Greek poets, philosophers, dramatists, and historians. Also maps, a chronology, a genealogy of Greek gods, and a glossary of Greek terms. Size: 9¼" by 12¼". Indexed.

Chicago Tribune: "A sumptuous book, in which Grecian history, art, great writings about Greece, and outstanding photographs, combine to give a rounded picture of Hellenic civilization at its peak."

GREEK KYLIX

This perfect facsimile of a kylix, or Greek drinking bowl, measures 5⅛" in diameter, and 7½" across the handles. The original dates from 400-300 B.C. The intaglio design in the bowl is fern leaves, fishnet weights, and honeysuckle. With the cooperation of the Metropolitan Museum of Art, New York, this reproduction in heavy silver plate on pewter was crafted for HORIZON by The Gorham Company.

416 Pages Regular Edition $18.95 De Luxe Edition $21.95

READERS' PRICE: $14.95 (458) • DE LUXE EDITION: $17.95 (459)

The De Luxe Edition is boxed, covered in heavy embossed buckram.

GREEK KYLIX: $10.95 (460)

Canadian Buyers: The Canadian Customs and Excise Bureau requires a 38% duty on imported silver. Duty will be collected by Canadian Customs on delivery.

THE HORIZON BOOK OF

THE RENAISSANCE

This comprehensive illustrated history is an authoritative introduction to *every* aspect of the Italian Renaissance.

The main narrative is by Dr. J. H. Plumb of Cambridge University. H. R. Trevor-Roper, Sir Kenneth Clark, Garrett Mattingly, Morris Bishop, Ralph Roeder, J. Bronowski, Iris Origo, Denis Mack Smith, and Maria Bellonci contribute essays on Leonardo, Machiavelli, Doge Francesco Foscari. . . . There are 480 illustrations, a third in color. Size: 9¼" x 12¼". Indexed.

Los Angeles Examiner: "A rich treasure for the student of art, for the general reader, for the lover of fine books."

432 Pages *Regular Edition $17.50* *De Luxe Edition $19.95*

READERS' PRICE: $13.95 (450) • DE LUXE EDITION: $16.45 (451)

The De Luxe Edition is bound in black embossed buckram and boxed.

THE HORIZON BOOK OF

LOST WORLDS

A sumptuously illustrated introduction to nine ancient civilizations that were "lost" until rescued from oblivion by modern archaeology and scholarship.

Sophisticated or savage, exotic or unexpectedly familiar, each of the nine civilizations developed a colorful and highly individual culture.

The author is Leonard Cottrell, perhaps the most celebrated popular writer of our day on ancient worlds. There are 480 illustrations—over 120 in color. Size: 9¼" by 12¼". Indexed.

The New York Times: "The most ambitious and expertly conceived of its kind ever published for the general reader."

432 Pages *Regular Edition $17.95* *De Luxe Edition $20.45*

READERS' PRICE: $13.95 (452) • DE LUXE EDITION: $16.45 (453)

The De Luxe Edition is bound in black embossed buckram and boxed.

THE HORIZON HISTORY OF
CHRISTIANITY

Whatever our beliefs, we all belong to a society shaped by the Christian tradition. Here is that heritage, recounted with authority and style by Roland H. Bainton, formerly Titus Street Professor of Ecclesiastical History at Yale University. There are 490 illustrations, over 150 in color. Size, 9¼" x 12¼". Indexed.

432 Pages *Regular Edition $18.95* *De Luxe Edition $21.95*

READERS' PRICE: $14.95 (456) • DE LUXE EDITION: $17.95 (457)

The De Luxe Edition is boxed, covered in heavy embossed buckram.

THE HORIZON BOOK OF
THE AGE OF
NAPOLEON

This is the first single volume designed to tell and picture the full story of the Napoleonic Age. J. Christopher Herold (winner of the National Book Award) has written the narrative. There are 350 illustrations, 120 in color: paintings, portraits, engravings, furniture, fashions. . . . Size, 9¼" x 12¼". Indexed.

432 Pages *Regular Edition $18.95* *De Luxe Edition $21.95*

READERS' PRICE: $14.95 (454) • DE LUXE EDITION: $17.95 (455)

The De Luxe Edition is boxed, bound in heavy black buckram.

ADVENTURES IN HISTORY

FOR YOUNG READERS

These are two illustrated series of history books: (1) AMERICAN HERITAGE *Junior Library*, on American history; and (2) HORIZON *Caravel Books*, on world history. Both series are family books (ages 10 to adult) and are combined under the over-all title of *Adventures in History*.

The first consideration has been to make each volume authoritative history that is attractive and absorbing to read. Each is written by an experienced author and covers a single topic or major figure from history—Yankee Whaling, Vikings, Washington.... Manuscripts are reviewed by a top authority on each subject.

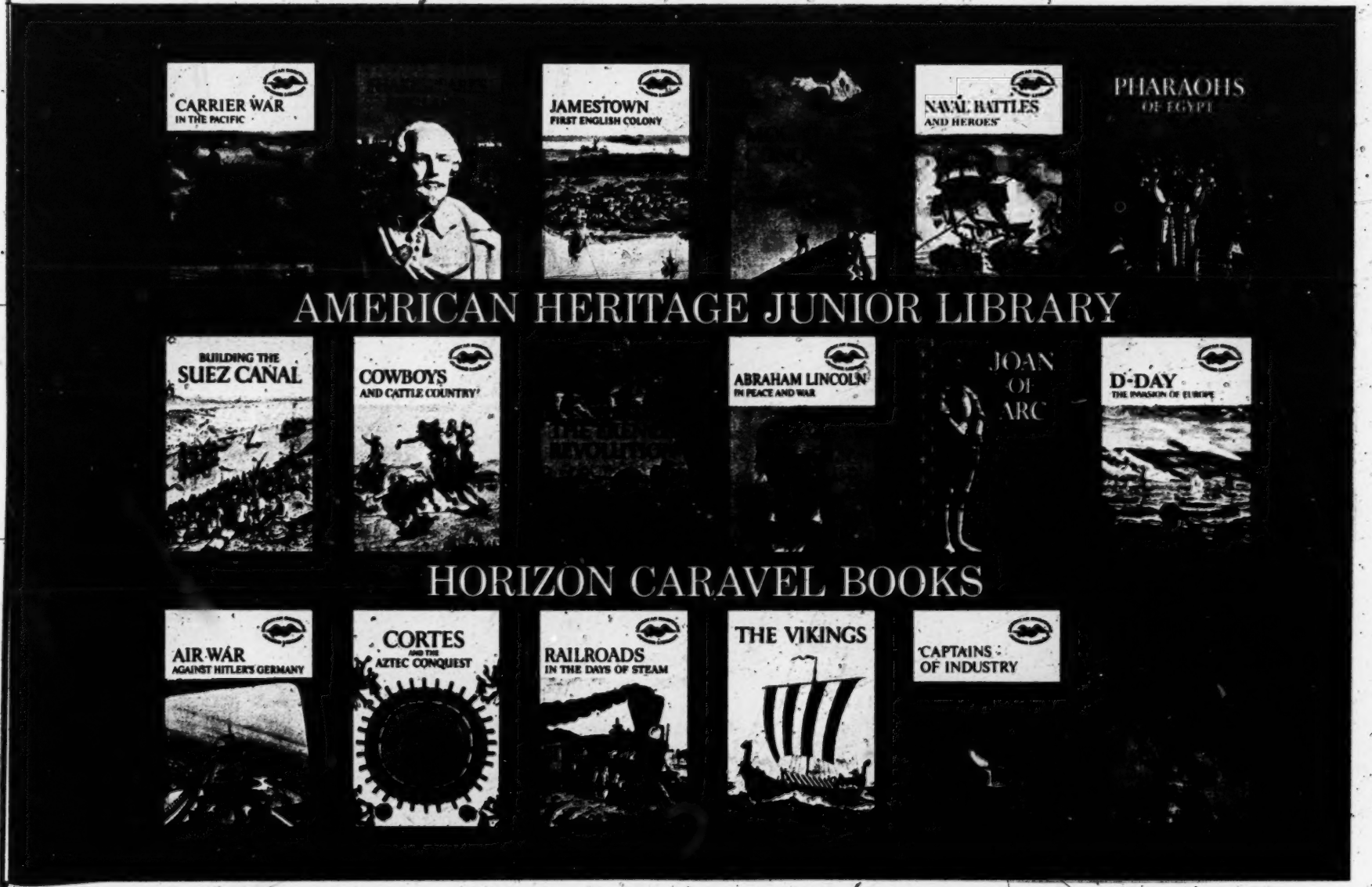
Illustrations are outstanding. Most are from the period covered, many in excellent color.

"Carefully and seriously written, well indexed, and illustrated on every page with stunning paintings and drawings of the period surveyed...of interest to adults." *Saturday Review*

The retail price of each book is $4.95.

You may subscribe for a year and receive each of the next six volumes, published at two-month intervals, for the subscriber price of $2.95 each. For gift subscriptions, an attractive announcement card will be sent. The annual Readers' Price is $17.70 for six books, postpaid (a $12 reduction from retail).

Annual Enrollment **(1002)**
Annual Gift Enrollment (recipient and donor at different addresses) **(2002)**
To buy individual titles, order by number. **READERS' PRICE: $3.30 EACH**


CARRIER WAR
IN THE PACIFIC
JAMESTOWN
FIRST ENGLISH COLONY
NAVAL BATTLES
AND HEROES
PHARAOHS
OF EGYPT
AMERICAN HERITAGE JUNIOR LIBRARY
BUILDING THE
SUEZ CANAL
COWBOYS
AND CATTLE COUNTRY
ABRAHAM LINCOLN
IN PEACE AND WAR
JOAN
OF
ARC
D-DAY
THE INVASION OF EUROPE
HORIZON CARAVEL BOOKS
AIR WAR
AGAINST HITLER'S GERMANY
CORTES
AND THE
AZTEC CONQUEST
RAILROADS
IN THE DAYS OF STEAM
THE VIKINGS
CAPTAINS
OF INDUSTRY

AMERICAN HERITAGE *Junior Library*

THE STORY OF YANKEE WHALING — by Irwin Shapiro. Consultant: Edouard A. Stackpole, Curator, Marine Historical Assn., Mystic, Conn. A true-to-life account of perhaps the most adventurous of all American industries. Illustrated with maps, paintings, and photographs. **(300)**

INDIANS OF THE PLAINS — by Eugene Rachlis. Consultant: John C. Ewers, Smithsonian Institution. The story ranges from prehistoric times to the Sioux uprisings of 1890—how Plains Indians lived before and after the advent of the white man. **(301)**

RAILROADS IN THE DAYS OF STEAM—by Albert L. McCready. Consultant: Lawrence W. Sagle, Curator, B&O Transportation Museum. Steam-powered trains range from the Tom Thumb to giant locomotives. Their story includes outrageous outlaws and spectacular train wrecks. **(302)**

DISCOVERERS OF THE NEW WORLD — by Josef Berger. Consultant: Lawrence W. Wroth, Librarian Emeritus, Brown University. The Age of Discovery was marked by daring adventures. 150 pictures. **(303)**

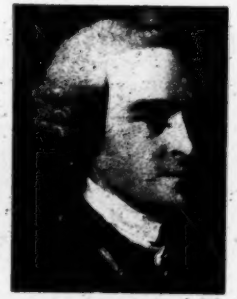
THOMAS JEFFERSON AND HIS WORLD—by Henry Moscow. Consultant: Dumas Malone, author of "Jefferson and His Time." The story of a man who appears to be a dozen good men rolled into one great one. **(304)**

NAVAL BATTLES AND HEROES — by Wilbur Cross. Consultant: John B. Heffernan, Vice President, Naval Historical Foundation. The story of the U.S. Navy, with 211 pictures of battles and insignia, naval cannon, and the plan of a man-of-war. **(305)**

MEN OF SCIENCE AND INVENTION—by Michael Blow. Consultant: Robert P. Multhauf, Head Curator, Dept. of Science and Technology, Smithsonian Institution. Here are 350 years of progress in American science by thinkers and tinkerers who changed the course of history. **(306)**

TRAPPERS AND MOUNTAIN MEN — by Evan Jones. Consultant: Dale L. Morgan, historian. The exploits of the rugged men who explored and trapped and supplied beaver for the top hats of Europe. **(307)**

PIRATES OF THE SPANISH MAIN — by Hamilton Cochran. Consultant: Robert I. Nesmith, Curator, Foul Anchor Archives (a museum of pirate lore). Tales of pirates and privateers who roamed in search of treasure-laden galleons. **(308)**



THE CALIFORNIA GOLD RUSH — by Ralph K. Andrist. Consultant: Archibald Hanna, Curator, Western Americana Collection, Yale Library. The story of the flamboyant '49ers who, by racing west to strike it rich, stretched the U.S. to the Pacific. **(309)**

THE PILGRIMS AND PLYMOUTH COLONY — by Feenie Ziner. Consultant: George F. Willison, author of "Saints and Strangers." From the Mayflower's hardships to ultimate success, the often not-so-prim Pilgrims led eventful lives. **(310)**

TEXAS AND THE WAR WITH MEXICO — by Fairfax Downey. Consultant: Paul M. Angle, Director, Chicago Historical Society. The story of the tangled relations between Mexico and the U.S.—from the Alamo to the Halls of Montezuma. **(311)**

COWBOYS AND CATTLE COUNTRY — by Don Ward. Consultant: J. C. Dykes, U.S. Department of Agriculture. The Wild West—saloons and settlers, feuds and friendships, outlaws and sheriffs. **(312)**

STEAMBOATS ON THE MISSISSIPPI—by Ralph K. Andrist. Consultant: C. Bradford Mitchell,

American Merchant Marine Institute. Here are the sidewheelers in their heyday, marked by gaiety, profits, and adventure. **(313)**

GREAT DAYS OF THE CIRCUS—by Freeman Hubbard. Consultant: Leonard V. Farley, Librarian, Harry Hertzberg Circus Collection. The magic world of P. T. Barnum, overstated posters, wild beasts, and a willingly deceived but entertained public. **(314)**

THE FRENCH AND INDIAN WARS—by Francis Russell. Consultant: Lawrence Henry Gipson, historian. The bloody wars lasting over 70 years when colonists and redcoats fought together against the French and their Indian allies. **(315)**

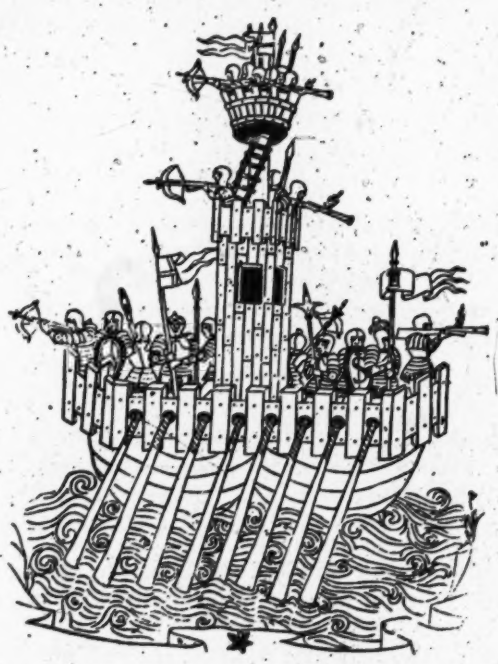
WESTWARD ON THE OREGON TRAIL—by Marion T. Place. Consultant: Earl Pomeroy, Professor of History, University of Oregon. The inspiring story of the pioneers and the fortune-seekers who laid out the trail to the Oregon territory. **(316)**

D-DAY, THE INVASION OF EUROPE—by Al Hine. Consultant: General S.L.A. Marshall, Chief Historian, European Theater of Operations. In this lucid account, the longest day and the greatest naval invasion of history come to life. **(317)**

CLIPPER SHIPS AND CAPTAINS—by Jane D. Lyon. Consultant: Carl G. Cutler, author of "Greyhounds of the Sea." The story of the clipper ships, when they were the fastest, most beautiful ships in the world. **(318)**

LEXINGTON, CONCORD, AND BUNKER HILL—by Francis Russell. Consultant: Richard M. Ketchum, author of "The Battle of Bunker Hill." An exciting history of America's challenge to the greatest military power of the time. **(319)**

ADVENTURES IN THE WILDERNESS—by Rutherford Platt. Consultant: Horace M. Albright, former Director, National Park Service. The story of the land of North America, and its effect on the emergent American character. **(320)**



ANDREW JACKSON, SOLDIER AND STATESMAN—by Ralph K. Andrist, Consultant: Arthur M. Schlesinger, Jr. Old Hickory, from greenhorn lawyer to the people's President. **(321)**

THE BATTLE OF GETTYSBURG—by Bruce Catton. The most eminent historian of the Civil War tells of those three epic days, from the first skirmishes through the confused battle to the costly victory. **(322)**

COMMODORE PERRY IN JAPAN—by Robert L. Reynolds. Consultant: Douglas MacArthur II. A gripping account of Matthew Perry's remarkable voyage in 1853 to open the door to a closed society. **(323)**

THE MANY WORLDS OF BENJAMIN FRANKLIN—by Frank R. Donovan. Consultant: Whitfield J. Bell, Associate Librarian, American Philosophical Society. Franklin's ranging intellect, industry, and wit make his story an inspiration to Americans. **(324)**

THE ERIE CANAL—by Ralph K. Andrist. Consultant: Carter Goodrich, Dept. of Economics, Columbia University. Almost everyone, except De Witt Clinton, believed it couldn't be done. Here is how Lake Erie was linked with the Hudson. **(325)**

IRONCLADS OF THE CIVIL WAR—by Frank R. Donovan. Consultant: Bruce Catton. How these ugly, brave ships changed the nature of naval war. 121 pictures. **(326)**

AMERICAN HERITAGE *Junior Library*

AIR WAR AGAINST HITLER'S GERMANY—by Stephen W. Sears. Consultant: Marvin W. McFarland, Asst. Chief, Science and Technology Div., Library of Congress. The tension-filled story of how American aircraft brought air victory to the Allies. **(327)**

ABRAHAM LINCOLN IN PEACE AND WAR—by Earl Schenck Miers. Consultant: Paul M. Angle, Director, Chicago Historical Society. A fine account of the great man's inspiring life, with 159 illustrations—paintings, photographs, mementos. **(328)**

AMERICANS IN SPACE—by John Dille. Consultant: Philip S. Hopkins, Former Director, National Air Museum. The first chapters of the conquest of space, from Goddard to the first Americans to leave the earth. **(329)**

JAMESTOWN: FIRST ENGLISH COLONY—by Marshall Fishwick. Consultant: Parke Rouse, Jr., Executive Director, Jamestown Foundation. The often tragic but always exciting story of the first Englishmen to settle in America. **(330)**

CARRIER WAR IN THE PACIFIC—by Stephen W. Sears. Consultant: Admiral E. M. Eller, Director of Naval History, Navy Dept. How the American Carrier force helped topple the empire of Japan, from Pearl Harbor to Leyte Gulf. Many action pictures. **(331)**

CAPTAINS OF INDUSTRY—by Bernard A. Weisberger. Consultant: Allan Nevins, Pulitzer Prize-winning historian. The story of ten business titans who helped mold America into a mighty industrial empire. **(332)**

GEORGE WASHINGTON AND THE MAKING OF A NATION—by Marcus Cunliffe. Consultant: Richard B. Morris, Gouverneur Morris Professor of History, Columbia University. This biography depicts Washington as the remarkably versatile man he was—general, President, hero, farmer, and framer of the Constitution. **(333)**

HORIZON *Caravel Books*

KNIGHTS OF THE CRUSADES—by Jay Williams. Consultant: Margaret B. Freeman, Curator, The Cloisters. The tale of the knights who, for two bloody centuries, fought to free the Holy Land. 161 pictures. **(350)**

HEROES OF POLAR EXPLORATION—by Ralph K. Andrist. Consultant: Admiral George Dufek, Director, Mariners Museum, Newport News, Va. The wilderness of the Arctic and the Antarctic attracted a rare breed of explorer, from Eric the Red to Byrd. **(351)**

RUSSIA UNDER THE CZARS—by Henry Moscow. Consultant: Cyril E. Black, Professor of History, Princeton University. Imperial Russia was stamped by blood and brilliance—from Ivan the Terrible to the doomed Romanovs. **(352)**

ALEXANDER THE GREAT—by Charles Mercer. Consultant: Cornelius C. Vermuele, III, Curator of Classical Art, Museum of Fine Arts, Boston. The saga of the man who in one decade put an indelible mark on history. 121 pictures, 47 in color. **(353)**

NELSON AND THE AGE OF FIGHTING SAIL—by Oliver Warner. Consultant: Fleet Admiral Chester W. Nimitz, U.S.N. The story of England's most spectacular naval hero and the men and ships that brought him fame, honor, and victory. **(354)**

EXPLORATION OF AFRICA—by Thomas Sterling. Consultant: George H. T. Kimble, Professor of Geography, Indiana University. Bristling jungle adventure follows the great explorers of the Dark Continent—Burton, Speke, Livingstone. **(355)**

JOAN OF ARC—by Jay Williams. Consultant: Historian Charles Wayland Lightbody. Clad in man's armor, sword drawn, with God as her guide, Joan of Arc freed her country. Within a year she was burned at the stake. Here is Joan—woman, warrior, saint. **(356)**

THE SEARCH FOR EARLY MAN—by John Pfeiffer. Consultant: Anthropologist Carleton S. Coon. The remarkable remnants left by primitive man tell us how he looked, how he lived, how he evolved. **(357)**

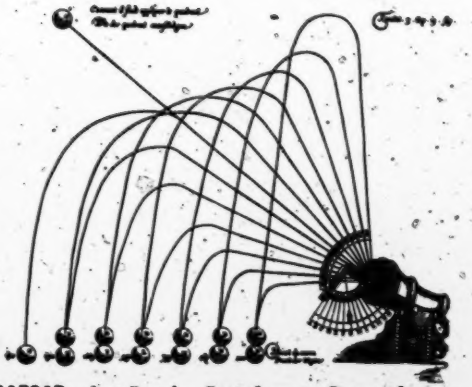
CAPTAIN COOK AND THE SOUTH PACIFIC—by Oliver Warner. Consultant: Dr. J. C. Beaglehole, Victoria University of Wellington, New Zealand. Curiosity made James Cook an explorer; determination brought him success: the Pacific Ocean, mapped. **(358)**

SHAKESPEARE'S ENGLAND—by the Editors of HORIZON. Consultant: Louis B. Wright, Director, the Folger Shakespeare Library. Here is the dazzling age of Elizabeth I, seething with plots and throbbing with pageantry, and the man whose writing is immortal. **(359)**

MARCO POLO'S ADVENTURES IN CHINA—by Milton Rugoff. Consultant: L. Carrington Goodrich, Professor Emeritus of Chinese, Columbia University. Mareo Polo accomplished one of the greatest journeys of all time, and inspired a yen to explore that would continue for generations. **(360)**

THE VIKINGS—by Frank R. Donovan. Consultant: Sir Thomas D. Kendrick, former keeper of British Antiquities, British Museum. Like their tapestries, Viking history is fiercely colorful. 162 illustrations. **(361)**

THE UNIVERSE OF GALILEO AND NEWTON—by William Bixby. Consultant: Giorgio de Santilla, Professor of History and Philosophy of Science, M.I.T. Two scientific giants: Galileo, who discovered how things move; Newton, who discovered why. **(362)**



CAESAR—by Irwin Isenberg. Consultant: Richard M. Haywood, Professor of Classics, New York University. Here is the brilliant, often treacherous, always single-minded and compelling career of Julius Caesar. **(363)**

CORTES AND THE AZTEC CONQUEST—by Irwin R. Blacker. Consultant: Gordon Ekholm, Curator of Mexican Archaeology, American Museum of Natural History. How Hernando Cortes and a tiny band of gold-hungry Spaniards toppled the empire of Montezuma. **(364)**

THE FRENCH REVOLUTION—by the Editors of HORIZON. Consultant: David L. Dowd, Professor of History, University of Florida. The revolution of 1789, which flamed out of control for six years in the name of liberty, equality, fraternity. **(365)**

LEONARDO DA VINCI—by Jay Williams. Consultant: Bates Lowry, Professor of Art History, Brown University. Leonardo, more than any other man, epitomized the restless genius of Italian Renaissance. **(366)**

PHARAOHS OF EGYPT—by Jacquetta Hawkes. Consultant: Bernard V. Bothmer, Curator of the Department of Ancient Art, Brooklyn Museum. This history traces the 2,000 years of Egypt's rise and decline, and focuses on the period of her greatest power, The New Kingdom. **(367)**

MOUNTAIN CONQUEST—by Eric Shipton. Consultant: Bradford Washburn, Director, Boston Museum of Science. This history of mountaineering offers adventure in abundance—from 1760, when Michel Paccard scaled Mont Blanc, to the dizzying conquest of Everest by Hillary. **(368)**

BUILDING THE SUEZ CANAL—by S. C. Burchell. Consultant: Charles Issawi, Professor of Economics, Columbia University. A stirring account of Ferdinand de Lessup's extraordinary achievement—a canal across the sizzling Egyptian desert to connect the Mediterranean with the Red Sea. **(369)**

Regular Price
$4.95 each

READER'S PRICE: $3.30 EACH

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes involved	2
Question Presented	2
Statement of the Case	4
Summary of Argument	7
Argument	11
Illinois May Require Collection of Its Use Tax By An Out- Of-State Mail Order Business Which Regularly And Systematically Solicits Substantial Orders and Delivers Its Goods In Illinois	11
The Issue—Amenability To-Suit	11
Nexus Criteria	13
Ability To Collect The Tax	16
A. A State May Require Collection of Its Use Tax By an Out-Of-State Seller Who Continually and Systematically Distributes Advertising Material Which Results In the Substantial Shipment of Goods Into the State	18
Miller Bros. Co. v. *Maryland*, 347 U.S. 340	18
Nelson v. *Sears Roebuck & Co.*, 312 U.S. 359.	23
Nelson v. *Montgomery Ward & Co., Inc.*, 312 U. S. 373	25
American Oil Co. v. *Neill*, 380 U.S. 451	26
General Trading Co. v. *Tax Comm'n*, 322 U.S. 355; *Scripto, Inc.* v. *Carson*, 362 U.S. 207.	27
In Personem Jurisdiction Cases	32
Case Conclusion	33

Page

B. To Permit A State To Require Out-Of-State Sellers Who Engage In Substantial In-State Business Sales And Deliveries To Collect Local Use Tax, To The Extent The Seller Has Not Paid A Corresponding Sales Tax On The Same Transaction, Is Both Legally And Economically Sound And Necessary To Preserve Local Merchants And State Government 35

1. Compliance With The Illinois Use Tax Could In No Way Discriminate Against Or Impose Cumulative Burdens Upon Out-Of-State Mail Order Businesses 35

The Report 38

2. To Constitutionally Measure A Use Tax All That Is Required Is The Use Or Consumption Of The Property Within The State ... 40

3. Participation In Self-Government In No Way Relates Or Conditions The Imposition Or Collection Of A Use Tax 40

4. Local Merchants Do Suffer Competitive Disadvantage Where Required To Compete With Out-Of-State Mail Order Firms Who Are Not Required To Collect And Remit Taxes 41

C. There Is No Limitation Upon The Jurisdiction Of The State To Require Extraterritorial Collection Of Its Use Tax In The Circumstances Of This Case, And Possible Congressional Action Can And Should Have No Effect Upon This Court's Present Ruling On the Constitutional Issues Now Before It 46

Conclusion 47

Appendix A 49-52

Table of Citations

Cases

American Oil Co. v. *Neill*, 380 U.S. 451 ....16, 18, 19, 26, 27

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 42

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62....
.....12, 25, 26, 27, 28

General Trading Co. v. *Tax Comm'n*, 322 U. S. 355
.....8, 9, 10, 12, 13, 21, 24, 25, 26, 27, 28, 29, 30, 31, 33, 39, 40, 41

Harvester Co. v. *Department of Treasury*, 322 U.S. 340 .....31, 32

Henneford v. *Silas Mason Co.*, 300 U.S. 577 12

International Shoe Co. v. *Washington*, 326 U.S. 310
.....14, 15, 32

McGee v. *International Life Ins. Co.*, 355 U.S. 220..32, 34

McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327 .....26, 27, 31

Miller Bros. Co. v. *Maryland*, 337 U.S. 340 .....9, 18, 19, 20, 21, 22, 23

Monamotor Oil Co. v. *Johnson*, 292 U.S. 86 ....12, 13, 28

Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373 25

Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365 ...8, 9, 12, 18, 23, 24, 25

Northwestern Portland Cement Co. v. *Minnesota*, 358 U.S. 450 38

Scripto, Inc. v. *Carson*, 362 U.S. 207 ....8, 12, 13, 15, 16, 19, 21, 22, 23, 25, 27, 28, 29, 30, 33, 38, 39

Southern Pacific Co. v. *Gallagher*, 306 U.S. 167 12

Page

State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So. 2d 91. 16

Travelers Health Assn. v. *Virginia*, 339 U.S. 643 32

Constitution and Statutes

Constitution of the United States:

Article I, Section 8 (Commerce Clause) 11

Fourteenth Amendment (Due Process Clause) 11

Public Law 86-272, 73 Stat. 555 (1959) 38

Public Law 87-17, 75 Stat. 41 (1961) 38

State Statutes

Ill. Rev. Stat., (1963), Ch. 120, § 440 et seq. (Illinois Sales or Retailers' Occupation Act) 2

§ 451 6

Ill. Rev. Stat., (1963), Ch. 120, § 439.1 et seq. (Illinois Use Tax Act) 2, 5

§ 439.1 2

§ 439.2 2

§ 439.3(c) 3, 9, 35, 36, 41

§ 439.8 ..... 1, 5, 7

§ 439.9 ..... 4, 29, 39

Miscellaneous

Report of the Special Subcommittee on State Taxation of Interstate Commerce, House Report No. 565, 89th Congress, 1st Session (1965) 18, 36, 37, 38, 39, 41, 42, 43, 44, 45

U. S. Congress, House Report, 16491, 89th Congress, 2nd Session (1966) 39, 46, 47

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966

NO. 241

NATIONAL BELLAS HESS, INCORPORATED,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLEE

Opinion Below

The opinion of the Supreme Court of Illinois (R. 86-99) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against Appellant as an action in debt pursuant to applicable provision, specifically Section 439.8, of the Illinois Use Tax Act, (Ill. Rev. Stat.,

(1963) Ch. 120, Section 439.1 et seq.,) and the Illinois Sales Tax or Retailers' Occupation Tax. (Ill. Rev. Stat., (1963) Ch. 120, Section 440 et seq.)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966 (R. 100). Notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966 (R. 101). This Court noted probable jurisdiction on October 10, 1966 (R. 106). The jurisdiction of this Court rests on 28 U.S.C. 1257 (2) and 2101 (c).

QUESTION PRESENTED

Whether it violates the Fourteenth Amendment Due Process Clause or the Commerce Clause for a State to require an out-of-State mail order house that continually and systematically solicits business in the State by means of catalogs and sales flyers, and who, pursuant to its solicitations ships substantial merchandise into the State for use and consumption by citizens in the State, to collect and remit a non-discriminatory use tax.

Statutes Involved

The Illinois Use Tax Act (Ill. Rev. Stat., (1963) Ch. 120, Section 439.1 et seq.) as applicable to this case provides in material part as follows.

Section 439.2 in critical part provides:

• • •

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of

business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.

• • •

Section 439.3 in critical part provides:

• • •

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

• • •

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

• • •

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible property in this State.

• • •

Section 439.9 in critical part provides:

• • •

> . . . each retailer required or authorized to collect the tax herein imposed shall pay to the Department (of Revenue) the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data in the Department on request.

• • •

Additional related sections of the Illinois Use Tax Act and the Illinois Sales Tax or Retailers' Occupation Tax are reprinted in Appendix A, pp. 49-52.

STATEMENT OF THE CASE

The Appellant, National Bellas Hess, Incorporated, (herein referred to as "National"), Statement is generally accepted as correct and accurate subject to the following additional observations and qualifications.

National's comment that the terms "retailer maintaining a place of business within this State," as those terms were used in the related Illinois statute, were ". . . originally given a conventional meaning . . ."[1] is argumentative and

---

1. *Brief for Appellant* p. 4.

possibly misleading. The terms were given a meaning and interpreted in keeping with the express language of the statute, language which at that time did not include the specifically added and now concerned "catalog solicitation—in-state delivery" provision with which this Court is now concerned. The present interpretation of the statute as amended to include the "catalog solicitation—in-state delivery" provision is by no means unconventional, but is rather, its only possible interpretation. Thus, the statute now before this Court has been given a conventional meaning; the issue of the case relates not to the interpretation of the statute but to its constitutional propriety.

National's characterization of the "catalog solicitation—in-state delivery" provision as being an "artificial definition" raises an issue best reserved for the argument section of National's brief.

National's statement, specifically its description of the "Proceedings Below,"[2] may not clearly set forth the particular procedural background of the present action. To more accurately detail the proceedings below we submit the following additional statement information.

On January 21, 1963, the Appellee, Department of Revenue of the State of Illinois, (herein referred to either as "Illinois" or the "State"), pursuant to statute,[3] notified National of the amount that had been determined due from National to the State based upon measurable in-state use tax transactions. (R. 2) This notice was sent by registered mail to National at its North Kansas City, Missouri, address, and a copy was also sent to the Secretary of State

---

2. *Brief for Appellant* p. 6.

3. Ill. Rev. Stat., (1963), Ch. 120 Section 439.1 et seq., specifically Section 439.8.

of the State of Illinois and to National's attorneys. National did not, as was its right, file a protest to the proposed assessment or request a hearing to determine the correctness of the assessment. (R. 2) These rights to protest and to request a hearing were specifically spelled out in the proposed assessment notice. Nor did National file, as it did in the present action, a special appearance. Simply stated, National totally ignored the notice of proposed assessment which was initiated to determine a final assessment.[4]

On June 26, 1963 the State, again by registered mail addressed to National at its North Kansas City, Missouri address, sent National a notice that a hearing had been conducted and that a final assessment determination had been made and entered in accordance with the prior, proposed assessment. (R. 2, 3, 5, 6 and 7) Notices of this assessment determination were also sent to the Illinois Secretary of State's Office and to National's attorneys. (R. 7-11) National did not respond to this notice.

Pursuant to Ill. Rev. Stat., (1963), Ch. 120, Section 451, National had 35 days in which it could have pursued an additional remedy directed at the final assessment determination entered against it. The statute provides for a filing in the courts of an administrative review action wherein all of the determinations and proceedings of the

---

4. For this reason matters related to the accurateness of the assessment were not before the Illinois Supreme Court and are not now before this Court. National has never questioned the correctness of the assessment amount, save for its comments on p. 6 of its present brief that: "The period of the assessment thus began the day of the enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment." (*Brief for Appellant*, p. 6)

Illinois Department of Revenue related to the final assessment determination entered against National could be subjected to judicial review. National did not avail itself of this right.

The instant action was brought October 15, 1963 as an action in debt pursuant to the provisions of the Illinois Use Tax Act. (Ill. Rev. Stat., (1963), Ch. 120 Section 439.8) (R. 1) The service provision of the Illinois Use Tax Act was complied with. (R. 11, 12-17) Once again a certified copy of process and the complaint were sent by registered mail to National at its North Kansas City, Missouri, address, as well as to the Illinois Secretary of State and National's attorneys. Only at this juncture in the proceedings did National take affirmative action in the form of its special appearance. (R. 18)

Summary of Argument

A.

The decisions of this Court treating nexus or minimum contact requirements have appropriately placed emphasis on substance over form in determining when an out-of-state vendor's in-state business activities render it liable to collect and remit a state use tax and subject itself to the jurisdiction of the state courts. The systematic and continuous nature of the business and the substantiality of the business results obtained, the proper minimum contact criteria, are fully satisfied in the instant case. Appellant in a systematic and continuous aggressive manner exploited the Illinois consumer market by sending into Illinois and soliciting by means of its catalogs and advertising flyers. This solicitation effectively resulted in the placing of substantial orders by Illinois citizens, requir-

ing appellant to cause continuous and substantial deliveries into Illinois of the merchandise ordered by the Illinois citizens. Parenthetically we might paraphrase the apropos remark of this Court in *Scripto, Inc. v. Carson,* 362 U.S. 207, 211, where it captured the gravemen of this type case by observing that the only incident which occurs outside of the state is the acceptance by the out-of-state vendor of the orders.

Through its in-state presence by means of continuous and systematic catalog solicitation and resulting deliveries Appellant has effectively realized a significant business efficiency in Illinois, a business efficiency which justifies the State in requiring Appellant to collect and remit the Illinois Use Tax. This equation of business efficiency criteria with legal minimum contact criteria is a sound and necessary rule which has been adopted by this Court. *Scripto, Inc.* v. *Carson,* 362 U.S. 207; *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335 and *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 365.

In *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 365, this Court considered circumstances identical in both factual and legal posture to those in this case with one exception. In *Nelson* v. *Sears* the out-of-state vendor did have retail stores in the taxing state of Iowa, however, these retail stores were in no way related to the out-of-state catalog sales which were the subject of the suit. In this Court's later decision in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, the presence of the retail stores in *Nelson* v. *Sears* were characterized as being "constitutionally irrelevant" to the decision and more importantly to the right of the state to collect its tax. *General Trading Co.* v. *Tax Comm'n,* 322, U.S. 335, p. 338. Thus,

relieved of the "constitutionally irrelevant" retail stores this case is on all fours with *Nelson* v. *Sears*.

Appellant's reliance on *Miller Bros. Co.* v. *Maryland*, 337, U.S. 340, is both legally and factually unavailing. *Miller Bros.* was not, as here, a catalog solicitation case. In *Miller Bros.*, the purchasers left the taxing state to make purchases out-of-state at the vendor's store. The vendor did not exploit the state consumer market by means of solicitation. Importantly, there was no utilization of catalogs by the vendor. There was not aggressive, but only occasional, operation by the vendor in the taxing state.

B.

Far from discriminating against interstate trade and out-of-state vendors the Illinois taxing statutes specifically and effectively preclude discrimination or multa-state taxation. To the extent a tax is paid in another state it need not be paid to Illinois. (Ill. Rev. Stat., (1963), Ch. 120, Section 439.3(c)). Thus, a discrimination could never result from collection of the Illinois use tax. Discrimination could, however, result from a failure to enforce collection of this tax if out-of-state mail order firms enjoy tax free sanctuaries in their principle state of operation. Such mail order firms could operate at an economic advantage over local merchants and those out-of-state vendors who do collect and remit the Illinois tax.

The measurable incident of a use tax is the use or consumption of property in the state. A use tax, as here, properly predicated upon use or consumption of property in the State is constitutionally sustainable without reference to incidental relationships which may attach to the property. (*General Trading Co.* v. *Tax Comm'n*,

322 U.S. 335, p. 338) Moreover, assuming an additional constitutional justification for its use tax in the circumstances of the present case, the State of Illinois has among other things made its roads and courts available to Appellant's use. It is difficult to perceive Appellant's catalogs and merchandise being delivered throughout the State without the necessary use of State roads.

Participation in self-government is not and reasonably could not be a prerequisite to imposing and collecting a state use tax. In the first place a corporation, such as Appellant, could never enjoy participation in self-government in any state. Also, such a requirement could not have been satisfied in the context of the *General Trading* case, where the out-of-state vendor operated in the State through migratory salesmen.

C.

The Illinois Use Tax which serves as the basis of the present claim is an integral part of the State's fair and nondiscriminatory tax system. Accepting the constitutional validity of the Illinois tax system, and more particularly the constitutionally sound application of that system in the circumstances of the present case, the mere possibility that Congress *may* pass legislation which could require a change in the Illinois system can and should have no affect on the present decision of this Court. This observation is especially appropriate where as here the possible legislation is intended to curb abuses not appearing or inherent in the Illinois tax system or the circumstances of the present case.

ARGUMENT.[5]

Illinois May Require Collection of Its Use Tax By An Out-Of-State Mail Order Business Which Regularly And Systematically Solicits Substantial Orders and Delivers Its Goods In Illinois

—The Issue—Amenability To Suit—

National's argument asserts a violation of the Fourteenth Amendment Due Process Clause. We agree that this is the principle issue and we further agree that this issue is necessarily inwoven with similarly related "Commerce Clause" issues. We cannot agree, however, with National's suggestion as to when—at what point of time—this issue attaches or arises. We respectfully submit that the Fourteenth Amendment Due Process Clause issue only arises and relates to the right of Illinois to require National to collect the tax and to subject National to the jurisdiction of its courts. Conversely National also directs its arguments to the right of The State to measure a tax on the transaction involved.

Admittedly the Due Process issue, wherever applied, is similar in that it concerns nexus and minimum contact requirements arising out of the due process clause. However, as candidly and most appropriately observed by National:

---

5. The order of this Brief will follow the same chronological and reasonably close identifying designations as initiated by National in its Brief. However, additional sub-heading designations are used for added clarity, quicker reference and to stress the affirmative aspects of our case.

> The burden of making a defense in a foreign jurisdiction is less onerous than the other burdens of acting as an extraterritorial tax collector, and therefore raises a less serious threat to the preservation of an open national market. (*Brief of Appellant*, p. 13 F.N. 2)

The tax in issue is measured upon the use or consumption of tangible personal property within the State. It is a classical use tax. We suggest a state's right to measure a use tax against items delivered into and intended for final use of consumption in the state is no longer subject to question. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62; *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335; *Scripto, Inc.* v. *Carson*, 362 U.S. 207. In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 363, this Court with the following language unequivocally resolved the issue National now seeks to resurrect: "The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, as far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583; *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 177."

National's argument objecting to its role as a tax collector is also without legal foundation and contrary to the prior holdings of this Court. Suffice we respectfully cite the generally referred to decision of *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86. At pages 93 and 94 the Court stated:

> The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement.

In *Monamotor,* unlike here, the tax collector did reside in the state. However, in *General Trading* and *Scripto,* where, as here, the tax collector was not within the state, the Court merely cited *Monamotor* as controlling reiterating briefly but emphatically: "To make the distributor the tax collector for the State is a familiar and sanctioned device" (*General Trading* v. *Tax Comm'n,* 327 U.S. 335, 338). And in *Scripto* the Court again observed: "Nor do we believe that Florida's requirement that appellant be its tax collector on such orders from its residents changes the situation. As was pointed out in *General Trading Co.,* this is "a familiar and sanctioned device." (*Scripto, Inc.* v. *Carson,* 362 U.S. 207, 212.)

The due process issue attaches to the State requiring National to collect and remit the tax and to rendering National amenable to process and suit but does not and cannot be related to the propriety of the Illinois use tax.

—NEXUS CRITERIA—

In initially casting his paramount argument National states: "In our view, the relevant test of nexus is whether the out-of-State concern has property or representatives carrying on its business within the taxing State." (*Brief of Appellant* p. 12.) We respectfully suggest that this is not an accurate statement but a faulty over generalization of the nexus criteria and further, even assuming *arguendo,* this to be the criteria it is satisfied by National's in-state business activities.

Admittedly the in-state presence of property or representatives may well satisfy or cumulatively aid in satisfying the nexus requirement. However, property or representatives are not the *sine qua non* of the criteria. This Court has never expressed the nexus criteria in such gen-

eral, artificial and limited terms, a fact apparent by the conspicuous absence of case support for this statement by National. For that matter, this Court has taken pains to indicate the nexus criteria ". . . cannot be simply mechanical or quantitative." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319.

The emphasis of this Court in deciding nexus or minimum contact criteria cases has been directed towards the systematic as opposed to the occasional, towards the continuous as distinct from the casual, towards the substantial as opposed to the insignificant, and finally, towards the substance as distinct from the form of the nature of the activities being considered. In deciding the instant case the Illinois Supreme Court applied these criteria. The facts before the Court, facts upon which the Illinois Court justified making National amenable to this proceeding, are briefly reviewed as follows:

1. National's systematic and continuous, as distinct from irregular or casual, distribution throughout the State of its catalogues and other advertising material.

2. National's systematic and continuous, as distinct from irregular or casual, solicitation within the state by means of the above-mentioned catalogues and advertising material.

3. The systematic and continuous, as distinct from irregular or casual, placing of orders for merchandise through and with the aid of National's catalogues in this State by Illinois residents.[6]

---

6. By way of illustrating the magniture of National's in-state business and its in-state systematic and continuous operations, covering the period from July 17, 1961 through October 31, 1962, defendants should have collected Illinois taxes amounting to $74,593.75. This tax amount would be measured against sales of $2,174,744.86.

4. National's systematic and continuous, as distinct from irregular or casual, causing to be delivered within this State to Illinois residents for final use or consumption the merchandise sold by National.

5. National's systematic and continuous collection in Illinois from State residents by defendant's common carriers, independent contractors or agents of the purchase price of the merchandise sold.[7]

Parenthetically, it might well be observed that as in *Scripto:* "The only incident of this sales transaction that is nonlocal is the acceptance of the order." (*Scripto, Inc.* v. *Carson,* 362 U.S. 207, 211.)

Clearly National engaged in regular, systematic and substantial Illinois directed and oriented business activities. These activities, substantial in their nature and substantial in their business success and result, gave rise to the liability sued upon and satisfy the minimum contacts requirement of the Due Process Clause. On the basis of these activities, we respectfully suggest, it was not offensive ". . . to our traditional conception of fair play and substantial justice . . ." to require National to collect and remit the Illinois tax and respond to the instant suit which related to and emanated from these same activities. *International Shoe Co.* v. *Washington,* 326 U.S. 310, 320.

Actually the facts of this case can satisfactorily comply with the limited nexus criteria test which National suggests. National's catalogs and advertising flyers, admittedly personal and not real property, if that formal dis-

---

7. Admittedly C.O.D. type collection was not the practice in all cases.

tinction is of significance,[8] are found within the State, as are its "representatives" and their delivery trucks who and which made deliveries of and collections for National's merchandise. Again resorting to form over substance these "representatives" are not employees, however, as common carriers does National now argue that they are legally distinct from the "independent contractors" in *Scripto*?[9] The test set forth in *Scripto* is resolved favorable to Illinois in that the use of catalogues and common carriers does not ". . . result in changing (its) local function of solicitation nor bear upon its effectiveness in securing a substantial flow of good into . . ." Illinois. *Scripto Inc.* v. *Carson,* 362 U.S. 207, 211.

—ABILITY TO COLLECT THE TAX—

A final observation is required. In its initial sentence National states what it believes Illinois is seeking to do by the present suit. Its final clause,—i. e. ". . . when they cannot collect it" requires comment. (*Brief for Appellant*

---

8. See *Americal Oil* v. *Neill,* 380 U.S. 451, 455 as being the most recent in a long and unaltering line of expressions by the Supreme Court to the effect that in judicial analysis of state tax cases emphasis should be placed on substance and not form.

9. In support of its nexus argument National cites and relies upon *State of Alabama* v. *Lane Bryant Inc.,* 277 Ala. 385, 171 So. 2d 91, which National states was decided upon "indistinguishable facts". (*Brief For Appellant* p. 12) This statement is not accurate. In *Lane Bryant* there were no in-State deliveries by truck or common carrier—only the mail was used.

p. 11) If unintentionally related to National in the context of the present case the implication that it could not or did not collect the Illinois use tax is faulty and not in keeping with the factual record of the case. There has never been evidence introduced or suggested or argument made that National could not, indeed did not, collect the tax in question. Any suggestion to the contrary is necessarily unsupported by the record and the facts of the case.

A. A State May Require Collection of Its Use Tax By an Out-Of-State Seller Who Continually and Systematically Distributes Advertising Material Which Results In the Substantial Shipment of Goods Into the State

The above stated issue is one which has not been directly presented to or resolved by this Court. (See *House Report* No. 565, 89th Congress, 1st Session, *Report of the Special Subcommittee on State Taxation of Interstate Commerce,* p. 627. This work is hereinafter cited and referred to as the *"Report"*.) This Court has, however, from time to time passed on cases which in varying degrees might be analogized in part with the factual circumstances and more strongly and importantly the legal issues raised herein. National in its brief has cited most of these cases and in certain aspects sought reliance upon them. We now consider, as National has already considered, these related cases, cases which we suggest express judicial approbation for the imposition and collection by Illinois of its use tax under the circumstances of the present case.

We think it fair to state that National's principle reliance is placed upon *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359 and *American Oil Co.* v. *Neill,* 380 U.S. 451. It would reasonably appear that National's reliance follows the same order in which we have listed these cases.

—Miller Bros. Co. v. Maryland, 347 U.S. 340[10]—

---

10. *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, is primarily discussed at sub-section (e) of National's Brief for Appellant, pp. 18, 19 and 20.

National's reliance on *Miller Bros.* is easily understood and appreciated. *Miller Bros.* is the only recent case[11] wherein this Court denied the state the right to collect its tax.

In *Miller Bros.* the seller and the sale were out of the taxing state of Maryland in Delaware. The customers were from the taxing state, Maryland. The tax was a use tax and Maryland sought to make the seller its collector of the tax. In these aspects, and only in these aspects, were the facts of *Miller* similar to those now before the Court.

We must respectfully take issue with National's representation of the facts in *Miller* as involving ". . . regular deliveries in Maryland . . .". (*Brief For Appellant,* pp. 18 and 19) The Court conversely characterized these same deliveries as being "occasional". *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 347. So also Justice Clark writing for the majority in *Scripto* again referred to the "occasional" deliveries in *Miller. Scripto Inc.* v. *Carson,* 362 U,S. 207, 212.

Turning to major fact dissimilarities between the two cases we submit the following. In *Miller Bros.* the Maryland residents left the state and personally made the purchases in Delaware. The Delaware seller only sold directly to customers personally present in its Delaware store, a distinction which gains particular importance with the realization that in some cases the seller did not and could not have necessarily known the state citizenship of his

---

11. *American Oil Co.* v. *Neill* also rules against the State in its attempt to impose its tax. However, for reasons detailed in our subsequent consideration of *American Oil Co.* we believe it to be so distinguishable from the facts and law of this case as to be totally without significance.

customer or more importantly the eventual destination of the merchandise.[12]

In some instances merchandise was carried away by the purchaser from the Delaware store. The Delaware seller made no C.O.D. deliveries and thus necessarily made no in-state collections for its merchandise. Also, the seller did not solicit mail orders in Maryland by means of catalogs. The sellers only in-state advertising arose from and was incidental to his placing ads in Delaware papers and advertising on Delaware radio stations. In addition occasional circulars were sent to all former customers which necessarily included some Maryland citizens. The seller's total sales covering a period of 4½ years from July 1, 1947 to December 31, 1953 were only $12,000.00. Parenthetically, we might contrast this figure with National's sales to Illinois citizens. Covering a period of some 14 months from July 17, 1961 to October 31, 1962 National's sales to Illinois residents were $2,174,744.86.[13]

Upon these facts, facts quite distinguished from those now present, the Court in deciding *Miller Bros.* observed that there was ". . . a wide gulf between this type of active and *aggressive operation* within a taxing state and the *occasional delivery of goods* sold at an out-of-state store

---

12. The Court emphasized this point by stressing the nature of a use tax and indicating: ". . . liability arises only upon importation of the merchandise to the taxing state, an event which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer." (*Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344.)

13. This figure is computed on the basis of National's $74,593.75 final assessment, having taken into consideration the Illinois statutory 2% administration expense rebate.

with *no solicitation* other than the incidental effects of general advertising. Here was *no invasion or exploitation of the consumer market* in Maryland" (Emphasis added) *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 347.

In referring to and distinguishing *General Trade Co.* v. *State Tax Comm'n,* 322 U.S. 335, the Court in *Miller Bros.* observed as follows:

> That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct *continuous local solicitation* followed by *delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order.* Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as *equivalent to being a local merchant.* (Emphasis added) *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 346.

The above underscored distinguishing features, continuous local solicitation, delivery of ordered goods to the consumer, and the fact that the only nonlocal phase of the sale was its acceptance, are all present in this case as they were in *General Trading Co.* It should further be observed that in distinguishing *General Trading Co.,* no emphasis, no less mention, was made of the traveling salesmen in *General Trading,* traveling salesmen who were not present in *Miller* and are not present here.

If the *Miller decision* itself is not clear in its holding and implications, any uncertainties which it may have caused have been emphatically resolved by the later *Scripto* decision. *Scripto Inc.* v. *Carson,* 362 U.S. 207. In writing *Scripto* Justice Clark unambiguously distinguished *Miller* and in so doing emphasized it was not a catalog

solicitation case such as we have here. In addition to observing, as National has already pointed out, that the seller in *Miller Bros.* ". . . had no solicitors in Maryland . . .", Justice Clark continued by stating that in *Miller*:

> There was no "exploitation of the consumer market"; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. True, there was an "occasional" delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but Marylanders went to Delaware to make purchases —Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland, *Scripto Inc.* v. *Carson,* 362 U.S. 207, 212.

Using these adumbrated criteria we contrast and in so doing distinguish *Miller Bros.* from this case by suggesting the following facts, all of which are present here, none of which were present in *Miller Bros.*

1. An "exploitation" by National of the State consumer market.
2. National's "regular, systematic displaying of its product by catalogs, samples or the like."
3. Sales were not made to individuals "personally present" at National's store or factory.
4. There were continual systematic and substantial deliveries into Illinois of National's merchandise.
5. There were regular and continuous sales flyers mailed to Illinois citizens in Illinois.

6. National could easily determine that the goods it sold and shipped to Illinois citizens were to be used eventually in the State.

In *Miller* the Court concluded there were not sufficient "minimum contacts" to constitutionally justify the tax imposition. Accepting *Scripto's* points of distinction they then become, *inter alia*, sufficient to justify the nexus and "minimum contacts" requirement. As observed, all are affirmatively present in this case.

—Nelson v. Sears Roebuck & Co., 312 U.S. 359—[14]

In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, the facts were similar if not identical to the facts of this case with one exception. In *Nelson* v. *Sears* the out-of-state catalog seller, Sears, maintained retail stores in Iowa, the taxing state. These in-state stores in no way related to the mail orders which gave rise to the suit. The Court stated ". . . the nub of the present controversy centers on the use of respondent as the collection agency for Iowa." (*Nelson* v. *Sears*, 312 U.S. 359, p. 364) The controversy, involving similar Due Process and Commerce Clause issues, was resolved in favor of the State of Iowa. On the basis of this ruling alone it is somewhat difficult to appreciate National's prime reliance on this decision.

Any argument National would make on the basis of *Nelson* v. *Sears* must necessarily be premised upon a contention that the in-state presence of the unrelated retail stores was the *sine que non* of the decision. Such a premise is not supported by the language of the decision. Understandably the presence of the retail stores elim-

---

14. *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, is primarily discussed at sub-section (b) of National's *Brief For Appellant*, p. 16.

inated the service of process issue and undoubtedly was a factor properly considered in determining minimum contracts. However, nowhere does the Court singularly distinguish or stress the overriding importance of the retail stores or indicate that their presence was essential to its decision.

On the contrary, this premise suggesting the presence of the in-state retail stores as a *sine que non* of *Nelson* v. *Sears* is directly and specifically rebuked in the context of the Court's later and we suggest dispositive opinion in *General Trading* v. *Tax Comm'n,* 322 U.S. 335. In unequivocally holding that the incidental in-state presence of the retail stores were not necessary to the decision reached in *Nelson* the Court concluded:

> And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance." (*General Trading* v. *Tax Comm'n,* 322 U.S. 335, 338)

In sum, rather than supporting National's arguments, *Nelson* when read along with the more recent *General Trading* case is totally dispositive of the instant issue adverse to National's contentions. Absent the in-state retail stores, a fact without legal significance according to the holding in *General Trading, Nelson* is on all fours with this case and gives support to the Illinois tax claim.

—Nelson v. Montgomery Ward & Co., Inc., 312 U.S. 373[15]

Nelson v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, was a companion case to *Nelson* v. *Sears*. The issues were identical and the disposition was the same. Interestingly however, is an observation made by Justice Douglas in writing the majority opinion. It is observed that Montgomery Ward, unlike Sears, advertised its catalog sales capacity in the taxing state of Iowa. The fact of these advertisements prompted Justice Douglas to observe:

> This stipulation clearly means that respondent has solicited mail order sales in Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. (*Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, 376.)

By this quote it would appear this Court as early as its 1940 decision in *Nelson* v. *Montgomery Ward* had indicated a disposition of the present issue by equating local solicitation with the presence of local agents. This rationale is easily and well understood in a reading of the Court's later decisions in *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335 and *Scripto, Inc.* v. *Carson*, 362 U.S. 207.

We appreciate National's argument directed at the above quoted language of the Court (*Brief For Appellant* pp. 16 and 17) wherein National suggests that the

---

15. *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373, is primarily discussed at sub-section (c) of National's *Brief For Appellant*, pp. 16 and 17.

use of the term "local" qualifies the above statement to mean only local advertising placed in-State by local employees. Obviously the advertising was local. However, we cannot agree with this qualification, a qualification which accurately would not have required a contrasting reference to *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, where there definitely were local agents within the State.

Even assuming the correctness of the qualification National now asserts it still remains that advertising within the State was of sufficient importance to draw judicial comment and at the veary least was part of the in-State nexus.

—American Oil Co. v. Neill, 380 U.S. 451—[16]

Reliance on *American Oil Co.* v. *Neill*, 380 U.S. 451 is factually no less legally misplaced. The tax involved therein was an occupation tax or more properly a sales tax and not as here a use tax. Quoting the trial judge's finding the Court acknowledged ". . . the taxable event or transaction is not the use by the local consumer of purchasers, but the 'receipt' of the gas by the dealer". (*American Oil Co.* v. *Neill*, 380 U.S. 451, 456.)

As to the importance of this distinction attention is respectfully called to *McLeod* v. *Dilworth Co.*, 322 U.S. 327 and to *General Trading Co.* v. *Tax Comm'n*, 322 U.S. 335. Both cases were decided on the same day and both involve almost identical fact circumstances with one major distinction. *Dilworth* concerned a sales tax and *General Trading* involved a use tax. This distinction

---

16. *American Oil Co.* v. *Neill*, 380 U.S. 451, is primarily discussed at p. 12 of National's *Brief For Appellant.*

was the *sine qua non* of the decisions, the Court upholding the tax in *General Trading* and conversely finding the tax constitutionally invalid in *Dilworth*.

By way of further distinction, *American Oil* was not a catalog mail order case—a fact apparent in that American Oil did have a place of business in the taxing state of Idaho. Further, the invitations to bid extended by the federal government, the bidding by American Oil, the government's accepting of the bids, the place from which the goods originated, passage of title and delivery of the goods to the government—all occurred outside the State of Idaho. Idaho's argument, rejected by the Court, was predicated upon the government, not American Oil, later bringing the oil into the State of Idaho. Appropriate to this case the Court in deciding observed ". . . no in-state activities connected with out-of-state sales". (*American Oil* v. *Neill* p. 458). It is difficult to analogize *American Oil* with any of the issues argued by National.

—General Trading Co. v. Tax Comm'n, 322 U.S. 335—[17]

Scripto, Inc. v. Carson, 362 U.S. 207—[18]

General Trading Co. v. *Tax Comm'n*, 322 U.S. 335; *Scripto, Inc.* v. *Carson*, 362 U.S. 207 and *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 are the other cases given designated sub-section treatment in National's

---

17. *General Trading Co.* v. *Tax Comm'n*, 327, U.S. 335, 338, is primarily discussed at sub-section (d) of National's Brief For Appellant, pp. 17 and 18.

18. *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 212, is primarily discussed at sub-section (f) of National's Brief For Appellant, pp. 20 and 21.

Brief.[19] All involve use tax collections from out-of-state sellers. In all three cases this Court approved the collection of the tax by the state.

Gallagher was the first case in which this Court required an out-of-state merchant to collect a use tax on ordinary retail sales. The in-state nexus consisted of two leased offices and two general agents who were in turn empowered to employ sub-agents and distributors. Its significance to the present issue is, we suggest, for the most part historical. National apparently cites this case as leaving unresolved the issue as to whether an out-of-state seller can be rendered a collector of a use tax. Admittedly this issue was not decided in *Gallagher*, for that matter it was not presented in *Gallagher*. This issue has, however, been resolved in many cases subsequent to *Gallagher*. *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 93 and 94; *General Trading Co.* v. *Tax Comm'n*, 327 U.S. 335, 338; *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 212.

General Trading and *Scripto* were decided upon factual circumstances and in the context of legal issues closely approximating these now before the Court.[20] By way of distinguishing *General Trading* from this case, in *General Trading* the out-of-state seller sent migratory or traveling

---

19. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is primarily discussed at sub-section (a) of National's Brief For Appellant, pp. 15 and 16.

20. In *Scripto* the Court, by footnote, set forth the pertinent provisions of the Florida statute. (*Scripto Inc.* v. *Carson*, 362 U.S. 207, 207, 208). With some insignificant emendation in certain language the Florida statute of *Scripto* and the Illinois statute now before the Court are identical.

salesmen into the taxing state to obtain its orders. National used its catalogs and mail flyers in lieu of the traveling salesmen. In *Scripto* the orders were solicited in the taxing state with the aid of 10 independent contractor brokers. These brokers utilized catalogs in advertising material. However, catalogs or advertising material were not distributed to or made available to the public as a whole. In sum, National's purpose was successfully and subsequently effected by the use of catalog solicitation. Conversely, in *General Trading* and *Scripto* individuals and not catalogs satisfied the business purpose.

No sales tax figures are mentioned in *General Trading*. In *Scripto,* covering a period of 4 years the out-of-state sellers sales totaled. $171,688.66. This figure is derived from computing the 3% Florida tax against the $5,150.66 assessment. The actual assessment against National without including the penalty was $74,593.75. This figure, having applied the 2% Illinois administration expense rebate,[21] would measure sales totalling $2,174,744.86 covering a period of approximately 14 months from July 17, 1961 to October 31, 1962. On the basis of the figures in *Scripto,* figures substantially less than those attributable to National, the Court concluded, *Scripto* had caused a ". . . substantial flow of goods into Florida". *Scripto, Inc.* v. *Carson,* 362 U.S. 207, 211. We think it fair to conclude upon this authority that National likewise has caused a substantial flow of goods into Illinois.

---

21. Ill. Rev. Stat., (1963), Ch. 120, Section 439.9 provides in relevant part as follows, a retailor in remitting taxes collected shall do so ". . . less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request."

National of obvious necessity has placed undue emphasis on the only factual distinction between *General Trading, Scripto* and this case—i.e. that there unlike here there were individuals in the form of migratory salesmen or independent contractors operating from time to time within the State.[22] We suggest that this distinction is unavailing, not only for the reasons heretofore stated, but also, because such an argument would fail to recognize the possibility that systematic and continuous solicitation, regardless of its form and notwithstanding the in-state absence of individuals whatever their legal relationship might be, is sufficient to justify the constitutional nexus requirement.

In this regard it is significant to note that in *Scripto* the company had no property or agents in the state. The fact that there were ten independent contractors in the state soliciting orders for its goods was held to be a sufficient nexus to require the company to collect the State's use tax. In an earlier stage in the development of the law it was thought that property or agents in the state were required before a corporation could be said to be "doing business" in a state and subject to its regulation. National attempts to retain this law giving as little effect to the decision in *Scripto* as possible by stating that now there must be property or a "representative" in the state. This distinction between *Scripto* and the instant case is patently invalid. In *Scripto* the corporation was not present in the state through its property or agents. The fact that independent contractors engaged in regular

---

22. National does not call attention to the fact that here unlike *General Trading* and *Scripto*, National continuously and systematically distributed its catalogs and other advertising material within the State.

solicitation of its market was the key to the decision. There is no valid basis to distinguish between solicitation by catalog or by independent contractor because in both cases no agent or property of the compeny is present in the state.

Justice Rutledge in a concurring opinion in *Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 and *General Trading* v. *State Tax Commissioner of Iowa*, 322, U.S. 355, and in a simultaneous dissenting opinion in *McLeod* v. *J. E. Dilworth Co.*, 332 U.S. 327[23] applied a proper and particularly appropos emphasis to those decisions, especially *General Trading*. Justice Rutledge indicated a continuous course of solicitation regardless of the means employed would satisfy constitutional requirements. Relative to the Court's continuous course of solicitation finding he observed.

> The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax.
>
> Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, *regular, continuous, persistent solicitation has the same*

---

23. For purposes of this discussion *McLeod* involved factual circumstances identical to those in *General Trading*, however, in *McLeod*, Arkansas sought to measure a sales as distinct from the use tax employed by Iowa in *General Trading*. The *McLeod* decision turned on the basis of this distinction.

economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. (Emphasis added) (*Harvester Co.* v. *Department of Treasury,* 322 U.S. 340, 354)

—In Personem Jurisdiction Cases—

Although not catalog mail order cases in the true sense of terminology, *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643, and *McGee* v. *International Life Insurance Co.,* 355 U.S. 220, are legally applicable to this case and give support to the State's present contentions. As heretofore observed the gravemen of the issue before this Court concerns the right of the State to make an out-of-state defendant amenable to its courts. *Travelers Health Assn.* and *McGee* involve the identical issue.

Both were insurance related cases wherein the out-of-state insurance company activities within the state seeking to effect them through legal process were far less than those attributable to National. In *Travelers Health Assn.* mail order health insurance policies were solicited by mail and delivered in the State of Virginia. Upon these relatively limited facts the Court at p. 648 disposed of a similar Due Process argument by citing, quoting and relying upon *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316. Particularly adverse to National's attempt to define the nexus criteria in terms of form rather than substance is the language expressed by Justice Black in writing the majority opinion: "Metaphysical concepts of . . . 'presence' in a state should not be solidified into a constitutional barrier . . .". (*Travelers Health Assn.* v. *Virginia,* 339 U.S. 643, 649)

In *McGee* a single insurance policy was delivered by mail into the State. The Court justified the State's serving

the insurance company with process by registered mail and thereby assuming jurisdiction over it on the rationale that the facts created minimum contacts and ties with the residents of the State. Surely a similar rationale is appropriate here where the contacts and ties with Illinois residents are indeed more substantial as well as more systematic and continuing.

— Case Conclusion —

General Trading and *Scripto* as well as the above discussed insurance related cases were not decided upon any artificial, formal or metaphysical presence rationale. Rather, the thought to be distilled from these decisions, indeed and thoughts to be distilled from a review of all of this Court's related minimum contact decisions, is that nexus is sufficient constitutionally where in the business sense it is sufficient practically; where it effectuates a business purpose within the state, notwithstanding as here, there being "apparently simpler needs for soliciting business",[24] so long as changes or reductions in local functions do not bear ".. ..upon its effectiveness in securing a substantial flow . . ." of business in the state. Here the business purpose is satisfied—as is the nexus requirement—by the sytematic and continuous supplying and promulgating of catalogs and other advertising material into the state and the accompanying subsequent collection for and delivery within the state of merchandise purchased. These multifarious business activities are inextricably intertwined and ineluctably tied to the State of Illinois. This reasoning bears profound analysis when

---

24. *General Trading* v. *Tax Comm'n*, 322 U.S. 335, 338. U.S. 335, 338.

measured against present demands of state financing, and is, we suggest, the legal polestar upon which courts should be guided in deciding similar issues.

In most appropriate language *McGee* v. *International Life Insurance Co.*, sets forth the theory and rationale upon which, we respectfully submit, this case should be decided.

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity. (*McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 222-223.)

The decisions of this Court best illustrates that states in effecting their tax law programs in dealings with out-of-state merchants do so in an atmosphere long removed of antiquated legal bromides and formal concepts which were intended to serve a time and a place with physical remoteness and detached isolationism were the political and business order of the day. This Court has well appreciated technicological improvements and ever increasing business sophistication. The vicissitudes of economic life have accordingly spawned necessary judicial concepts to meet these changes and advanced times.

B. To Permit A State To Require Out-Of-State Sellers Who Engage In Substantial In-State Business Sales And Deliveries To Collect Local Use Tax, To The Extent The Seller Has Not Paid A Corresponding Sales Tax On The Same Transaction, Is Both Legally And Economically Sound And Necessary To Preserve Local Merchants And State Government

The State of Illinois is in no way intending to or in fact obstructing the sale to Illinois residents and delivery into our State of ". . . Vermont maple sugars, New Orleans pralines, and the beautiful Sierra Club publications . . ." or any similar local specialties. (*Brief For Appellant* p. 21) On the contrary we respectfully submit that Illinois through the statutory tax plan now before the Court affords out-of-state sellers of these commodities or any other product the fairest of considerations. Parenthetically we might question whether combined total sales of these particular items to Illinois residents would even come close to approximating National's sales.

We cannot help but wonder if the ". . . onerous discriminatory and extraterritorial burdens . . ." imposed by Illinois in the context of the present case would be relieved or substantially lessened had National been fortunate, or unfortunate as the case may be, to have had a few migratory salesmen or 10 independent contractors from time to time present in Illinois in lieu of its catalogs and sales flyers? (*Brief for Appellant* p. 22)

1. Compliance With The Illinois Use Tax Could In No Way Discriminate Against Or Impose Cumulative Burdens Upon Out-Of-State Mail Order Businesses

Ill. Rev. Stat., Ch. 120, Section 439.3(c), specifically expressing a desire to prevent multistate taxation, provides the State use tax shall not apply to:

> The use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state. (Ill. Rev. Stat., (1963), Ch. 120, Section 439.3 (c))

In accordance with the statute set out above, where as in the circumstances of this case, the destination of merchandise sold in an interstate transaction is Illinois, the State imposes its use tax only to the extent a corresponding sales or use tax was not imposed by the state of origin. To the extent a tax has already been paid in the state of origin the above Illinois statute specifically creates a corresponding exemption to the extent of the tax already paid.

In providing as Illinois has for an off-set credit it is, admittedly, in a minority. The tenor of National's discrimination arguments might best be directed towards that minority, assuming *arguendo,* the arguments relation to constitutional issues. As observed in the Report: "Just short of half the States allow no credit for overpayment on the theory that the State where the property is finally used should be the State to get the tax."[25] The Report further indicates Illinois is one of 14 States providing such a credit exemption for taxes paid to other States. (Report p. 826—Chart)

We submit that by virtue of the above statute Illinois specifically and effectively provides against interstate transactions having to bear a greater burden than local sales transactions. There can be no multiple imposition

---

25. *Report,* p. 825, citing as follows: "See Dues, State Sales Tax Administration, p. 204 (1963)."

of the Illinois use tax. An out-of-state seller such as National is liable only for the difference between taxes measured in the original state (3% in Missouri) and the Illinois use tax, if a tax was measured in the original state.

Apropos National's allegation of discrimination we think it appropriate to refer to the Report and in so doing suggest that ". . . the states have made very little attempt to tax sales of goods shipped to the buyer in another state." (*Report,* p. 613) As indicated in the Report the fear of protests by their own businessmen that they would be placed at a competitive disadvantage has resulted in most states not taxing outshipments such as involved in the normal mail order transaction. The result of this practice renders transparent National's present concern with collecting the Illinois use tax. (A tax which assuming National to have paid its Missouri sales tax, would only amount to ½ of 1%.) Mail order catalog sellers in attempting to avoid remitting a use tax such as imposed here do so to effect a grossly iniquitious and total tax free transaction.

The result and predatory effect on local merchants of such a tax avoidance scheme is apparent. Local merchants who necessarily must collect the Illinois tax are forced to compete with out-of-state mail order sellers who can totally avoid taxation. Assuming, as suggested by National in the context of a different argument, that the ". . . margin of profit before taxes were 4% of sales . . .", and applying thereto the Illinois 3½% tax, our local merchants' gross profit would be dissipated to ½ of 1%. We respectfully suggest that what National, in the context of this case, and other mail order firms are attempting to do, is not eliminate a discrimination—allegedly directed at

them—but perpetrate a present discrimination against local sellers.

—The Report—

Throughout its brief National continually and quite dependently refers to the House Special Sub-Committee Report On State Taxation Of Interstate Commerce and possible statutory enactments which may result from the committee hearings. (89th Congress, 2nd Session, H.R. 16491) We believe National has both unduly and erroneously relied upon the Report. Admittedly legislation[26] creating the committee which prepared the Report was initially instigated by legislators and businessmen who took particular affront at the results of this Court's decision in *Northwestern Portland Cement Co.* v. *Minnesota,* 358 U.S. 450. Understandably the concern of mail order firms was not prompted by entirely altruistic motives.

Scripto, Inc. v. *Carson,* 362 U.S. 207, gave further emphasis to those who would legislatively set aside the decisions of this Court. *Scripto* resulted in expanding the study to include state sales and use taxes.[27] It is this expanded study which relates to the circumstances and issues of this case.

We feel that the Report itself is eminently fair and does an excellent job of probing the many problems related to the imposition and collection of state sales and use taxes. We respectfully suggest, however, that the emphasis of the Report, the abuses which it observed and suggested should be corrected, in no way concerned or concern the particular circumstances of this case.

---

26. Public Law 86-272, 73 Stat. 555 (1959).

27. Public Law 87-17, 75 Stat. 41 (1961).

The main trust of the Report primarily addresses itself to abuses resulting from the many variations in taxes and collection criteria in the various states. In addition to criticizing this lack of unanimity among the states secondary objection is found in the failure of states to provide an off-set credit provision to eliminate prossible multiple taxation. As observed in the Report and noted in this brief Illinois was and is among the 14 states who have provided such a salutary provision.

Also subject to criticism was the practice of not providing some reimbursement to sellers to help defray the cost of administering tax collections. Again, Illinois finds itself in the forefront having provided a 2% discount to retailers. (Ill. Rev. Stat., Ch. 120, Section 439.9)

H.R. 16491 to which National alludes, would, if passed, proscribe the State of Illinois from the further collection of its use tax under the circumstances of this case. Interestingly, the bill would also render for naught this Court's decision in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335 and *Scripto, Inc.* v. *Carson,* 362 U.S. 207. Similarly Iowa and Florida would be proscribed from future collections of its tax under the circumstances of the *General Trading* and *Scripto* decisions. (See H.R. 16491, Section 513(d)).

It is difficult to understand how this tentative bill can in any way affect the constitutional issues which National raises in the instant case. Certainly the passage of this bill, if it is to pass, could in no way affect the constitutional principles decided in *Scripto* and *General Trading.* So also, it should not, especially in its present posture, affect this Court's decision in this case.

2. To Constitutionally Measure A Use Tax All That Is Required Is The Use Or Consumption Of The Property Within The State

National argues it is not afforded any benefits or privileges by the State of Illinois. To put it bluntly this statement is legally specious and not true. In the first place the incident of the tax is the use or the enjoyment of property within the State, not as National's argument would suggest, its activities. As noted in *General Trading Co.* v. *Comm'n,* 322 U.S. 327, 338: "The mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share." The privilege there as here was the enjoyment of the property within the state.

Moreover, even when we address ourselves to the privileges made available to National by this State, as already mentioned in the preceding paragraphs, National's common carriers, delivering agents and bill collectors continually and systematically use among other less obvious things our roads. More importantly, our various state agencies, most obviously our court system, are available to National. In this regard National's allegation that it has not sought to exercise these rights is without merit. For determination is whether these rights or services are available to National, not, as implicit in National's argument, whether it has availed itself of their use.

3. Participation In Self-Government In No Way Relates Or Conditions The Imposition Or Collection Of A Use Tax

It is somewhat difficult to follow to a natural conclusion National's argument that its participation in self-govern-

ment is a prerequisite to Illinois imposing and collecting a use tax on items used or consumed in the State. This argument is particularly shallow when made, as here, by a corporation who necessarily cannot participate in self-government in any state. If such an argument were made it was obviously rejected in *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, where from its facts it would appear somewhat obvious that the migratory salesmen did not enjoy participation in Iowa self-government.

Not only is this argument faulty but the conclusion it attempts to suggest belies the circumstances in this case. The Illinois taxing plan, far from expressing a feeling of non-concern for out-of-state businesses, has, as already pointed out, specifically provided for such out-of-state businesses. The facts before the Court do not manifest an abuse of the democratic process to the detriment of National, no less other out-of-state businesses.

4. Local Merchants Do Suffer Competitive Disadvantage Where Required To Compete With Out-Of-State Mail Order Firms Who Are Not Required To Collect And Remit Taxes

National again finds itself relying upon, or better stated, suggesting a fact not in the record of this case; that it has paid a tax in Missouri on the related transactions. The facts anent this record disclose no such payments to Missouri. Moreover, if payments had been made they would necessarily serve to exempt National to the extent of such payments. (Ill. Rev. Stat. Ch. 120, Section 439.3(c)) Also, the Report indicates that such taxes are not usually imposed on mail order store transactions where as here the merchandise is shipped out-of-state. (*Report,* pp. 613, 776, 777 and 824)

Even assuming, *arguendo*, that National had paid a tax in Missouri and that as a result local competing merchants would not suffer a "competitive disadvantage", this would in no way effect the economic propriety no less the constitutional validity of the Illinois use tax.

Conversely, if National did not pay a Missouri tax and were not required to collect and remit the Illinois use tax a definite "competitive disadvantage" would attach as to its Illinois competitors. National cavalierly suggests this ". . . competitive disadvantage is greatly exaggerated." (*Brief For Appellant*, p. 37) "Competitive disadvantage" is not the subject of speculation, but rather, can be objectively measured with reference to the Illinois tax of 3½%. Again applying National's earlier suggestion that 4% would be a "pretty good" profit margin for such a business, we can easily compute and realize the impact, far from exaggerated, which would result in reducing a profit margin from 4% to ½ of 1%. (*Brief For Appellant*, p. 28)

Baldwin v. *G.A.F. Seelig Inc.*, 294 U.S. 511, is inopposite any issue now before the Court. *Baldwin* concerned an attempt by the State of New York to neutralize economic advantages belonging to the state of origin of milk. Purposely to obstruct and create an economic barrier directed towards the importation of milk New York by statute required that milk sold within the State have originally been sold by producers to dealers at prescribed minimum prices. It is one thing for a state to attempt an equalization of economic advantage. It is a very different thing for a state to apply its tax plan equally to all retailers.

A few extended quotations from the Report are necessary to qualify and place in proper perspective National's quotation from the Report appearing at page 38 of its

brief. The quote National sets forth suggests there is no competitive reason to require *specialized mail order* operators to collect taxes. It further suggests the possibility of problems in collecting such taxes. Not only is this quote unrelated to the constitutional arguments now before the Court, but it is also misleading.

National is not, within the terminology of the Report, a *specialied mail order* operator. In referring to specialized mail order operators the Report has reference to those offering only ". . . one or a very few items through brief magazine advertisements or direct mail solicitation." (*Report,* p. 770). Such specialized mail order operators comprised ". . . a great many small firms selling by magazine advertising, direct mail solicitation and the like . . ." (*Report,* p. 777).

On the other hand National would best fit the description of a mail order house which uses ". . . thick catalogs to conduct by mail what amounts to nationwide department stores." (Report, p. 770) National ". . . catalogs present a wide variety of merchandise . . . approximately 4000 different items . . .". (R. 32, 69) Appropriate to this distinction the Report observes:

> The collection problem is considerably mitigated where goods are offered in a catalog operation rather than in spot advertisements. Space is available to explain the sales tax in different States. In addition, the average order tends to be larger, making it more feasible to attempt to collect unremitted sales tax. Furthermore, most of the major catalog houses offer credit schemes of one form or another and sales tax from credit customers need merely be added to the amount due. Even on cash sales, purchases from a catalog often require the customer to make additions to the price for postage or freight that involve computations more complex than sales tax. This means that, on the one hand, customer reluctance to compute tax is partly overcome and, on the other

hand, the operation is committed to ironing out small inaccuracies in remittances. Remittances of too much cash, for example, are likely to occur in catalog orders because of the number of items per order and the resulting possibility that one or more items ordered may be out of stock. This situation, which for business reasons is kept to a minimum, nevertheless provides cash with which sales tax errors can sometimes be corrected before the balance is returned. An additional factor which makes the collection problem somewhat more manageable for the catalog house is that it is more likely than a spot-ad operation to have regular repeat orders, which afford the cooperative customer a convenient opportunity to make good a sales tax deficiency or other underpayment noted to him with his last order. For the major catalog house, then, it appears that although the responsibility to collect sales taxes causes clerical work and some losses, these problems are small when compared to similar problems handled in the regular course of business. (*Report*, pp. 771, 772)

The above observation totally discredits the impact of the economic, or pragmatic practical argument National seeks to make in this Court. Moreover, appearing in the same section of the Report by way of "Summary And Conclusions" two presently existing problems and inequities which would favorably be resolved by an affirmative ruling on behalf of the State in this case are indicated. The Report indicates the prevailing tax free sanctuary stitution enjoyed by mail order houses [28] and the resulting

---

28. "A special problem is presented by deliveries tax free from across a sales tax boarder". (*Report*, p. 776).

unfairness to local merchants and those few mail order firms which honor their obligations.[29]

29. "Mail-order operations comprise another type of retailing which sometimes receives tax shelter from State lines. Much of this business is concentrated in the large catalog houses. Among these, the firms with nationwide retail outlets are now charging sales tax just about wherever they ship. The others charge no tax where they have no outlets. Whatever it may be worth in diversion of customers, the result is a disparity between such firms and the mail-order houses and local merchants which do collect tax." (*Report* p. 777)

C. There Is No Limitation Upon The Jurisdiction Of The State To Require Extraterritorial Collection Of Its Use Tax In The Circumstances Of This Case, And Possible Congressional Action Can And Should Have No Effect Upon This Court's Present Ruling On The Constitutional Issues Now Befort It.

The reasoning of National's corresponding argument does not obtain when subjected to the most peripheral of legal scrutiny. To argue that this Court eschew deciding a constitutional issue now properly before it on the basis Congress *may* pass a statute having some future effect on similar transactions is patently without merit.

Admittedly if this were a question concerning the interpretation of a congressional statute National could argue congressional intent incident and relating to the passage of the particular statute. However, here we are concerned not with a statute, but constitutional provisions, provisions which are properly within the province of this Court and not Congress to interpret. Even assuming an involvement of congressional intent, it should be presented in the form of a statute and not, as here suggested, a *possible* statute.

Actually in the posture of this case Illinois can realize some succor from the possible legislation. Preforce, the draftors of the legislation would not go through the motions of suggesting an unnecessary bill. This bill would not have been drafted in the face of a belief by its draftors that this Court would resolve this case in favor of the mail order house. Only upon a belief and realization that the present facts present a sufficient legal nexus would such a bill have been drafted.

Congress can hardly be said to have demonstrated marked alacrity in passing legislation similar to that sug-

gested by H.R. 16491. We respectfully suggest that passage of this bill or any other similar type bill, is still at best a possibility somewhat removed in point of time.

Admittedly if H.R. 16491 is passed it will from its effective date preclude further use tax collections under the circumstances of this case. However, even if passed tomorrow it could have no adverse effect on the present claim and suit.

National, by its argument, would have this Court penalize Illinois notwithstanding the manifest fairness and non-discriminatory nature of the Illinois tax system. Illinois would be penalized solely upon the possibility that Congress *may* pass a statute aimed to curb abuses which themselves do not exist in the posture of the present case or related to the Illinois taxing statutes.

CONCLUSION

For the reasons urged herein it is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Suite 900, 160 North La Salle Street,
Chicago, Illinois,
FI 6-2000,

Attorney for Appellee.

RICHARD A. MICHAEL,
Assistant Attorney General,
TERENCE F. MACCARTHY,
Special Assistant Attorney General.
Of Counsel.

APPENDIX "A"

Statutes Involved

The Illinois Use Tax Act, Ill. Rev. Stat., (1963) Ch. 120, § 439.1 et seq., as it relates to the instant case provides in pertinent part as follows:

439.2 Definitions.] § 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale or use for demonstration by him of that property in any form as tangible personal property in the regular course of business. "Use" shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property and shall not mean the physical incorporation of tangible personal property, as an ingredient or constituent, into other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such purchase to cause to be transported in Interstate Commerce to destinations outside the State of Illinois. . . .

"Retailer" means and includes every person engaged in the business of selling tangible personal property for use, and not for resale in any form. . . .

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or

any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State.

439.3 Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exemptions.]

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

439.8—Tax collected as debt owed to state—Exception.]

§ 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act[1] upon his gross receipts from the same transaction.

439.12a. Appointment of secretary of state for service of process—Force and effect of service.] § 12a. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act.[1] and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals his wheretbouts, and any person (residents or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof. and by sending to the taxpayer by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State

---

1. Section 440 et seq. of this chapter.

1. Section 439.2 of this chapter.

through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit. Added by act approved July 25, 1961. L.1961, p. 1945.

The Illinois Sales Tax or Retailers' Occupation Tax Act, Ill. Rev. Stat., (1963) ch. 120, § 440 et seq., as it relates to the instant case provides in pertinent part as follows:

451. Rules and regulations—Notices—Hearings—Review of administrative decisions—Appeals.] § 12. The Department is authorized to make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient.

Whenever notice is required by this Act, such notice may be given by United States registered or certified mail, addressed to the person conserned at his last known address, and proof of such mailing shall be sufficient for the purposes of this Act. Notice of any hearing provided for by this Act shall be so given not less than 7 days prior to the day fixed for the hearing.

• • •

The provisions of the "Administrative Review Act," approved May 8, 1945, as amended, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Department hereunder. The term "administrative decision" is defined as in Section 1 of said "Administrative Revew Act".

BLANK

PAGE

Office-Supreme Court, U.S.
FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CITATIONS

Cases

	Page
General Trading Co. v. *Tax Comm'n*, 322 U.S. 335	5, 6, 7
Miller Bros. Co. v. *Maryland*, 337 U.S. 340	2, 4, 7
Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373	7
Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365	4, 5, 6, 7
State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So.2d 91 (1965)	2

Miscellaneous

Comment, 12 N.Y. Law Forum 121 (1936) 12

Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965) 2, 10, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

I

Four significant points emerge from appellee's discussion of the present state of the law applicable to the power of the buyer's State to require foreign sellers to collect its use taxes upon interstate transactions.

First, appellee concedes that this Court has never permitted a State to impose the obligation to collect use taxes upon out-of-State sellers upon so slender a nexus as the

interstate circulation of advertising and goods, where no local business is conducted and no salesmen or solicitors are seeking orders within the State. In every case in which the obligation was upheld the seller had local outlets, or local agents or brokers soliciting sales of its products.

Second, appellee concedes, by its silence, that "collection or payment of sales tax in a state where a firm does only a mail order business is virtually unknown" (*Report* 772);[1] and that only two States — Alabama and Illinois — have asserted a broader obligation. The Alabama Supreme Court rejected the contention. *State* v. *Lane Bryant,* 277 Ala. 385, 171 So.2d 91.

Third, in the only case in this Court in which a State has asserted that interstate advertising and deliveries by an out-of-State seller provide a nexus, the Court held that these contracts would not support imposition of an extraterritorial obligation to collect the buyers' tax. *Miller Bros.* v. *Maryland,* 347 U.S. 340. There is more subjective characterization than fact in appellee's effort (Br. pp. 22-23) to distinguish that decision by listing six elements, "all of

---

[1] As in our original brief, we use the reference *Report* to refer to the report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.Rpt. 565 and 952, 89th Cong., 1st Sess., 1965.

Two statistics given in our general description of the mail-order business, which we derived from the *Report*, appear to be mistaken. Our opening brief, p. 56, states that the five large catalog houses with retail outlets in almost every State account for $1.1 billion of the industry's almost $2.4 billion sales. The $1.1 billion figure is only the sales of the five large catalog houses on which sales or use taxes are paid. *Report* 772. Their total sales must therefore be somewhat larger, since not all States impose sales or use taxes. The $1.3 billion figure cited on p. 40 of our brief, which was obtained by subtracting $1.1 billion from $2.4 billion, is therefore too high. The correct figure cannot be derived from the *Report* but it is obviously very high and the essential fact remains unaltered:

> Collection or payment of a sales tax in a State where a firm does only mail-order business is virtually unknown (*Report* 772)

which are present here, none of which were present in Miller Bros." We discuss the six allegedly distinguishing elements seriatim.

(a) "*An 'exploitation' by National of the State consumer market.*" — The meaning of the characterization "exploitation" is not clear. Comparison of the actual facts shows that Miller advertised more intensively in part of Maryland than appellant in Illinois. Miller sent out regular mailings, which reached Maryland customers four times a year. Appellant sends its main catalogs twice a year. Miller also mailed occasional sales circulars to former customers. Appellant sends out intermediate flyers. In addition, Miller advertised twice a day in newspapers reaching Maryland customers. Appellant has no comparable daily advertising. Appellee mis-states the record when it asserts (Br. p. 15) "clearly National engaged in regular, systematic and substantial Illinois directed and oriented business activities." The record shows that all appellant's advertising, like Miller's, was general (R. 32-33, 68-69, 86-87).[2]

Measured by sales Miller's volume of business was smaller, but it amounted to several thousand dollars annually. Mr. Justice Douglas, on behalf of the Chief Justice and Justices Black and Clark, described it as a regular course of conduct.

(b) "*National's 'regular systematic displaying of its product by catalogs, samples or the like.'*" — Appellant uses no samples (R. 71-72). Obviously, nothing turns on the use of catalogs as opposed to other advertising, or on the number of pictures or degree of detail.

---

[2] Appellee also mis-states the record in its repeated intimations that appellant distributes advertising other than its catalogs. The court below accurately stated that appellant "has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois." (R. 87).

(c) *"Sales were not made to individuals 'personally present' at National's store or factory."* — This is irrelevant. The out-of-State seller's contact with the State where the buyer lives is neither increased nor diminished by the buyer's mailing an interstate order instead of making an interstate journey.

(d) *"There were continual systematic and substantial deliveries into Illinois of National's merchandise."* — In both cases merchandise reached customers in the State of destination. The difference is that Miller made its own deliveries in Maryland, in its own truck, with its own employees, which the dissenters thought decisive in *Miller*. This contact is totally absent from the present case because appellant delivers all its merchandise to the mails or common carriers in Missouri (R. 33, 70). Thus, our position here is entirely consistent with the dissenting opinion in *Miller Bros.* v. *Maryland*.

(e) *"There were regular and continuous sales flyers mailed to Illinois citizens in Illinois."* — The record shows only that there were annually "a number of . . . flyers" (R. 32, 70). Whatever their number, they cannot have possibly been as "regular and continuous" as Miller's daily advertising in the newspapers.

(f) *"National could easily determine that the goods it sold and shipped to Illinois citizens were to be used eventually in the State."* — The same fact appeared with respect to 60 percent of the sales in *Miller Bros.* v. *Maryland*. The Court held that even when this fact appeared, there was no obligation to collect the tax.

Fourth, in the only cases to deal directly with mail-order firms, the Court indicated that exclusively out-of-State sellers could not constitutionally be subjected to use tax obligations. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 373, upheld the power of Iowa to require Sears to collect the Iowa use tax because Sears had retail stores within the

State. Appellee's contention that the stores were irrelevant is belied by the careful reasoning of Mr. Justice Douglas' opinion for the Court (*id.* at 364):

> The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would be merely the result of impotence of State power. *Wisconsin* v. *J.C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business.

Then, acknowledging that there were out-of-State mail-order businesses which did not collect the tax on their sales into Iowa because they did no other, local business, Mr. Justice Douglas observed (*id.* at 365):

> unlike respondent they are not receiving benefits from Iowa for which it has power to exact a price.

Appellant asserts that the "incidental in-State presence of the retail stores were not necessary to the decision reached in *Nelson*" (Br. p. 24). It supports this argument by picking the phrase "constitutionally irrelevant" (Br. pp. 8, 9) out of a quotation from Mr. Justice Frankfurter's opinion in the *General Trading* case (Br. p. 24), while ignoring the context in which the phrase appears. The contention rests upon appellee's confusion of two distinct issues involved in use-tax litigation: (a) whether a State may exact a use tax from those who use within its borders goods purchased from out of State, and (b) whether the State has jurisdiction in the particular case to require the foreign seller to act as collector of the tax. The briefs in the *General Trading* case show that General argued the first issue, but not the second. General's con-

tention was that the use tax was really a sales tax and that Iowa could not tax the sale because there was no taxable event in Iowa, but only an interstate transaction consumated outside the jurisdiction. Brief for Petitioner, No. 441, October Term, 1943. Mr. Justice Frankfurter did not say that the Iowa stores were "constitutionally irrelevant" in general terms. He said that they were "constitutionally irrelevant" (322 U.S. at 338)—

> to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail-order goods.

Sears' Iowa stores were indeed "constitutionally irrelevant" to that issue. But they or the local solicitors were essential to any ruling upon the wholly distinct question of Iowa's jurisdiction to require the foreign seller to collect the tax. Mr. Justice Douglas' *Sears, Roebuck* opinion makes that clear. Mr. Justice Frankfurter said nothing to change or qualify it.

Our argument is upon the latter issue. We do not say that Illinois may not tax the purchasers of mail-order goods, but only that Illinois lacks jurisdiction over the appellant to require it to collect the tax. Appellee's quotation from *General Trading* is therefore irrelevant, and the distinction drawn in the *Sears, Roebuck* case remains controlling.

II

The distinction drawn in the *Sears, Roebuck* case between foreign corporations which have local retail outlets and out-of-State mail-order sellers "who receive no benefits from [the buyer's State] for which it has power to exact a price" is rooted in the fundamental principles governing jurisdiction to tax. The Court has held over and over again, where interstate transactions were in-

volved, that tax burdens may not be imposed by a State unless they bear a reasonable relation to the benefits or protection which the State affords. See authorities cited in our opening brief at pp. 32-33. The principle applies to the imposition of the burdens of acting as tax collector as well as to levy of the tax. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 364-365; *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 375; *General Trading Co.* v. *Tax Comm.*, 322 U.S. 335, 338, 356-357.

It is too plain for argument that Illinois has conferred no privileges, protection or benefits upon appellant. Appellee says that this statement is "legally specious and not true" because "the incident of the tax is the use or the enjoyment of property within the State" (Br. p. 40). This case is concerned with the burdens of acting as tax collector, not with the legal incidence of the tax. The use or enjoyment of the property by the purchasers is not a privilege or benefit enjoyed by appellant. The power to tax the purchasers' enjoyment does not automatically carry with it the power to tax the seller who is wholly outside the jurisdiction. *Miller Bros.* v. *Maryland*, 347 U.S. 340, 347.

Appellee also says (Br. p. 40) that appellant National enjoys privileges made available by Illinois because —

> National's common carriers, delivering agents and bill collectors continually and systematically use among other less obvious things our roads

The court below faced the facts more fairly (R. 87):

> [National] does not have in Illinois any agent . . . or other type of representative . . . to deliver merchandise, to accept payments, or to service merchandise it sells.

The court's statement is fully supported by the record (R. 34, 70-71).[3] It is also clear that appellant has brought no suits in Illinois (R. 34, 70).

The only argument that could fairly be made in an effort to show that appellant derives benefits from the State of Illinois would be that appellant does business in Missouri with U.S. postal authorities and wholly independent common carriers who operate in Illinois, and by these channels of interstate communication sells merchandise to Illinois residents; that while Illinois confers its protection and benefits only upon the postal authorities, the common carriers and the purchasers, nevertheless from their activities and enjoyment of property in Illinois appellant receives economic advantages in Missouri. But such indirect benefits, derived solely from activities outside the State, that initiate purely interstate commerce, have never been thought sufficient to support the imposition of extraterritorial obligations.

A contrary conclusion would be incompatible with the federal system. Accurately stated, the argument comes down to the proposition that, since Illinois confers benefits upon persons within its borders, it indirectly confers upon anyone outside its borders who deals with them sufficient

---

[3] No record references are given for appellee's references to "National's systematic and continuous collection in Illinois from State residents by defendant's common carriers, independent contractors, or agents of the purchase price of the merchandise sold" (Br. p. 17), its "representatives and their delivery trucks who and which made deliveries of and collections for National's merchandise." (Br. p. 16). These characterizations are utterly unfounded. By the expression "National's common carriers" appellee apparently refers to the Railway Express Agency, to which appellant delivers goods in Kansas City when they are too bulky for mailing (R. 70). Appellant has no ownership, control, or interest, in any common carrier. Appellee's reference to "delivering agents" is even more puzzling. Apparently it refers to the men who carry the U.S. mails. For the record plainly states that appellant does not have any agent or other representative delivering its merchandise in Illinois (R. 70-71). Appellee's reference to "bill collectors" likewise has no support in fact (*ibid*).

benefit to sustain subjecting him to extraterritorial obligations. Upon this theory Massachusetts could tax Florida hotels because the prosperity it bestows upon Massachusetts residents enables them to visit those resorts. Minnesota could tax Michigan factories because her farmers are a market for Michigan's tractors and cars. Idaho could reach out and tax the seller of gasoline in Utah where the property was to be brought into Idaho following the purchase. It was to prevent just such mutual aggressions and economic retaliation that the States entered into the federal union.

III

In its enthusiasm for Illinois' own revenue acts appellee overlooks the fundamental elements of the constitutional question. If Illinois may require an out-of-State enterprise, all of whose own activities are confined to another jurisdiction, to collect Illinois taxes upon Illinois residents because of the interstate circulation of its advertising and goods, then every other sales and use tax State may impose a similar obligation upon the same enterprise, in relation to its citizens. There are more than forty such States. Thus, the constitutional question is whether the imposition of this potentially multiplicitous obligation, as the price of engaging in the national circulation of goods and ideas from a single location, does not violate the constitution by clogging a national market that the due process and commerce clauses are designed to keep free.

Appellee, by silence, admits every one of the facts showing that the burdens imposed by its theory of jurisdiction would operate in a cumulative and discriminatory fashion. One reason, as explained in the report of the Special Subcommittee, is that "the problem of collecting the tax from the customer is . . . more difficult than in a

retail store." *Report* 771. State laws, including Illinois' statute, make the seller liable even if he is unable to collect the tax. Appellee complains that the record contains no evidence of appellant's inability to collect the tax but surely the Court cannot ignore this widely-known, general characteristic of the extraterritorial obligation in appraising its constitutionality.[4] Relevant data is in the Special Subcommittee's report — including references to non-collection rates as high as 75 percent (*Report* 771). Since our experience — an average 40 percent rate of non-collection — was somewhat more favorable, it seemed proper to include it in our brief, not because the particular figure is important but because it helps to illustrate the inherently discriminatory incidence of this kind of obligation.

In addition, the burdens of serving as tax collector for five, ten, twenty, or even fifty States are obviously heavier than the local merchant's duties in acting for a single State, not only because of the sheer increase in mere record-keeping and reports but also because of the added difficulties of working with numerous different laws, tax rates, taxing authorities, auditors and exemptions. We described these problems fully in our opening brief (pp. 22-32, 55-69). Appellee apparently concedes their existence. Its only response (Br. p. 36) is that Illinois avoids a double tax on the same sale by giving credit for any sales tax paid by the seller. To show that one potential source of cumulative burdens has been avoided does not eliminate or even reduce the others.

Furthermore, to speak only of States is to understate

---

[4] Much of the tax could not possibly have been collected by appellant because the assessment levied by Illinois ran back to the effective date of the Illinois Use Tax Act and thus covered a period in which sales were made from catalogs distributed before the Act. See our opening brief p. 41, n. 21. The insinuation that appellant has collected any part of the tax in question is unjust and, to borrow appellee's expression (Br. p. 17), contrary to "the facts."

the case. Appellant does not deny that its theory would subject a national mail-order firm to liability to act as tax collector for hundreds, if not thousands, of municipalities, counties, and other local subdivisions.

IV

Appellee also errs in questioning the relevance of the action in Congress. (Br. pp. 46-47).

First, the Special Subcommittee made the most complete factual study available of the impact of the obligation to collect use taxes upon interstate commerce. Upon that basis it recommended that steps be taken to prevent —

> the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting the tax. (*Report* 884).

At a minimum the finding is persuasive.

Second, the action taken by congressional committees is material because the Court's function in this area is to interpret the silence of Congress. The virtually unanimous action taken first by the Special Subcommittee assigned to study the problem and then by one of the most powerful congressional committees shows that the Congress, far from favoring the expansion of State power and sellers' obligations, seeks to cut them back beyond the point authorized by prior decisions. This is a strong reason for the Court, in interpreting the silence of Con-

gress, not to permit the extension of sellers' obligations into areas not sanctioned by the existing cases. See Comment, 12 N. Y. Law Forum 121, 135-136 (1936).

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

February, 1967.

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1966.

National Bellas Hess, Incorporated, Appellant, *v.* Department of Revenue of the State of Illinois.	On Appeal From the Supreme Court of Illinois.

[May 8, 1967.]

Mr. Justice Stewart delivered the opinion the Court.

The appellant, National Bellas Hess, is a mail order house with its principal place of business in North Kansas City, Missouri. It is licensed to do business in only that State and in Delaware, where it is incorporated. Although the company has neither outlets nor sales representatives in Illinois, the appellee Department of Revenue obtained a judgment from the Illinois Supreme Court that National is required to collect and pay to the State the use taxes imposed by Ill. Rev. Stats. (1965), c. 120, § 439.3.[1] Since National's constitutional objections to the imposition of this liability present a substantial federal question, we noted probable jurisdiction of its appeal.[2]

The facts bearing upon National's relationship with Illinois are accurately set forth in the opinion of the State Supreme Court:

> "[National] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to

[1] 34 Ill. 2d 164, 214 N. E. 2d 755.
[2] 385 U. S. 809.

> deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois." [3]

All of the contacts which National does have with the State are via the United States mail or common carrier. Twice a year catalogues are mailed to the company's active or recent customers throughout the Nation, including Illinois. This mailing is supplemented by advertising "flyers" which are occasionally mailed to past and potential customers. Orders for merchandise are mailed by the customers to National and are accepted at its Missouri plant. The ordered goods are then sent to the customers either by mail or by common carrier.

This manner of doing business is sufficient under the Illinois statute to classify National as a "[r]etailer maintaining a place of business in this State," since that term includes any retailer:

> "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stats. (1965), c. 120, § 439.2.

Accordingly, the statute requires National to collect and pay to the appellee Department the tax imposed by Illinois upon consumers who purchase the company's goods for use within the State.[4] When collecting this tax, National must give the Illinois purchaser "a receipt therefor in the manner and form prescribed by the [appellee]," if one is demanded.[5] It must also "keep

---

[3] 34 Ill. 2d, at 166–167, 214 N. E. 2d, at 757.

[4] Ill. Rev. Stats. (1965), c. 120, § 439.3.

[5] *Id.*, § 439.5.

such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the [appellee] shall require, in such form as the [appellee] shall require," and must submit to such investigations, hearings, and examinations as are needed by the appellee to administer and enforce the use tax law.[6] Failure to keep such records or to give required receipts is punishable by a fine of up to $5,000 and imprisonment of up to six months.[7] Finally, to allow service of process on an out-of-state company like National, the statute designates the Illinois Secretary of State as National's appointed agent, and jurisdiction in tax collection suits attaches when process is served on him and the company is notified by registered mail.[8]

National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co.* v. *Pennsylvania*, 370 U. S. 607, 621–622 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman* v. *Hewit*, 329 U. S. 249, 253. See also *Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663; *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450, 462. And in determining whether a state tax falls within the confines of the Due

[6] *Id.*, § 439.11.
[7] *Id.*, § 439.14.
[8] *Id.*, § 439.12a.

Process Clause, the Court has said that the "simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. See also *Standard Oil Co.* v. *Peck*, 342 U. S. 382; *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 344–345; *Scripto* v. *Carson*, 362 U. S. 207, 210–211.[9] See also *American Oil Co.* v. *Neill*, 380 U. S. 451, 458.

In applying these principles the Court has upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances. Where the sales were arranged by local agents in the taxing State, we have upheld such power. *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335. We have reached the same result where the mail order seller maintained local retail stores. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward*, 312 U. S. 373.[10] In those situations the out-of-state seller was

[9] Strictly speaking, there is no question of the connection or link between the State and "the person . . . it seeks to tax." For that person in *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, in *Scripto* v. *Carson*, 362 U. S. 207, and in the present case is the user of the goods to whom the out-of-state retailer sells. National is not the person being directly taxed, but rather it is asked to collect the tax from the user. It is, however, made directly liable for the payment of the tax whether collected or not. Ill. Rev. Stats. (1965), c. 120, § 439.8.

[10] National acknowledges its obligation to collect a use tax in Alabama, Kansas, and Mississippi, since it has retail outlets in those States.

plainly accorded the protection and services of the taxing State. The case in this Court which represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto* v. *Carson*, 362 U. S. 207. There we held that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida. In that case the seller had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods." 362 U. S., at 211.

But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. Indeed, in the *Sears, Roebuck* case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that "those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price." 312 U. S., at 365. And in *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, the Court held that a State could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland. There the seller advertised its wares to Maryland residents through newspaper and radio advertising, in addition to mailing circulars four times a year. As a result, it made substantial sales to Maryland customers, and made deliveries to them by its own trucks and drivers.

In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State,

and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities,[11] is a valid one, and we decline to obliterate it.

We need not rest on the broad foundation of all that was said in the *Miller Bros.* opinion, for here there was neither local advertising nor local household deliveries, upon which the dissenters in *Miller Bros.* so largely relied. 347 U. S., at 358. Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and

---

[11] As of 1965, 11 States besides Illinois had use tax statutes which required a seller like National to participate in the tax collection system. However, state taxing administrators appear to have generally considered an advertising nexus insufficient. For they have testified that doubts as to the constitutionality of such statutes underlay their failure to take full advantage of their statutory authority. Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, H. R. Rep. No. 565, 89th Cong., 1st Sess., 631–635 (1965). These doubts were substantiated by the only other State Supreme Court that has considered the issue now before us. The Alabama Supreme Court, dealing with a situation very much like the present one, found that this application of the use tax statute would be invalid under the Federal Constitution. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 So. 2d 91.

use taxes.[12] The many variations in rates of tax,[13] in allowable exemptions, and in administrative and record-keeping requirements[14] could entange National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of local government."

The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.[15]

The judgment is

Reversed.

---

[12] "Local sales taxes are imposed today [1965] by over 2,300 localities. . . . In most States, the local sales tax is complemented by a use tax." H. R. Rep. No. 565, *supra*, at 872.

[13] In 1964 there were seven different rates of sales and use taxes: 2, 2¼, 2½, 3, 3½, 4, and 5%. H. R. Rep. No. 565, *supra*, at 611–613, 607–608. The State of Washington has recently added an eighth, 4.2%. Wash. Rev. Code Ann. § 82.12.020 (Supp. 1966).

[14] "The prevailing system requires [the seller] to administer rules which differ from one State to another and whose application—especially for the industrial retailer—turns on facts which are often too remote and uncertain for the level of accuracy demanded by the prescribed system." H. R. Rep. No. 565, *supra*, at 673.

"Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable." *Id.*, at 882.

[15] Congress has in fact recently evidenced an active interest in this area. See Tit. II, Pub. L. 86–272, 73 Stat. 556, as amended by P. L. 87–17, 75 Stat. 41, which authorized the detailed congressional study of state taxation of interstate commerce that resulted in H. R. Rep. No. 565, *supra*. See also H. R. Rep. No. 2013, 89th Cong., 2d Sess. (1966).

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

No. 241.—October Term, 1966.

National Bellas Hess, Incorporated, Appellant, *v.* Department of Revenue of the State of Illinois.	On Appeal From the Supreme Court of Illinois.

[May 8, 1967.]

Mr. Justice Fortas, with whom Mr. Justice Black and Mr. Justice Douglas join, dissenting.

In my opinion, this Court's decision in *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960), as well as a realistic approach to the facts of appellant's business, dictates affirmance of the judgment of the Supreme Court of Illinois.

National Bellas Hess is a large retail establishment specializing in wearing apparel. Directly and through subsidiaries, it operates a national retail mail order business with headquarters in Kansas City, Missouri, and its wholly owned subsidiaries operate a large number of retail stores in various States. In 1961, appellant's net sales were in the neighborhood of $60,000,000, and its accounts receivable amounted to about $15,500,000.[1]

Its sales in Illinois amounted to $2,174,744 for the approximately 15 months for which the taxes in issue in this case were assessed. This substantial volume is obtained by twice-a-year catalogue mailings, supplemented by "intermediate smaller 'sales books' or 'flyers,'" as the court below styled them. The catalogue contains about 4,000 items of merchandise. The company's mailing list includes over 5,000,000 names. The "flyers" are sent to an even larger list than the catalogues and are occasionally mailed in bulk addressed to "occupant."

[1] Moody's Industrials (1962).

A substantial part of Bellas Hess' sales is on credit. Its catalogue features "NBH Budget Aid Credit"—which requires no money down but requires the purchaser to make monthly payments which include a service fee or interest charge, and which also incorporates an agreement, unless expressly rejected by the purchaser, for "Budget Aid Family Insurance." The company also offers "charge account" services—payable monthly including a "service charge" if the account is not fully paid within 30 days. The form to be filled in for credit purchases contains the usual type of information, including place of employment, name of bank, marital status, home ownership or rental. Merchandise can also be bought c. o. d. or by sending check or money order with the order for goods.[2]

There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient "nexus" to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in "exploitation of the consumer market" of Illinois (*Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 347 (1954)) by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. Bellas Hess could not carry on its business in Illinois, and particularly its

[2] Because this case was tried on affidavits, reference has also been made to the National Bellas Hess Catalogue, Spring and Summer 1967, to supplement the picture of appellant's business afforded by the record.

substantial credit business, without utilizing Illinois banking and credit facilities. Since the case was tried on affidavits, we are not informed as to the details of the company's credit operations in Illinois. We do not know whether it utilizes credit information or collection agencies, or similar institutions. The company states that it has "brought no suits in the State of Illinois." Accepting this as true, it would nevertheless be unreasonable to assume that the company does not either sell or assign its accounts or otherwise take measures to collect its delinquent accounts, or that collection does not include local activities by the company or its assignees or representatives.

Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein. Indeed, if it did either, the benefit that it received from the State of Illinois would be no more than it now has—the ability to make sales of its merchandise, to utilize credit facilities, and to realize a profit; and, at the same time, it would be required to pay additional taxes. Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users—and remit to the State—the use tax which is merely equal to the sales tax which resident merchants must collect and remit. To excuse Bellas Hess from this obligation is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers. In Illinois the rate is 3½%, and when it is realized that in some communities the sales tax requires, in effect, that as much as 5% be added to the amount that customers of local, tax-paying stores must pay,[3] the importance of the competitive dis-

[3] This is the current rate in Pennsylvania. Pa. Stat. Ann., Tit. 72, § 3403-201 (1964). See The World Almanac (1967, Newspaper Enterprise Assn.), pp. 136–137.

crimination becomes apparent. While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis. In such cases, the difference between the nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance. The national mail order business amounts to over $2,400,000,000 a year.[4] Some of this is undoubtedly subject to the full range of taxes because of the location of stores in the various States,[5] and some of it is and should be exempt from state use tax because of its sporadic or minor nature. See Report of the Special Subcommittee of the House Judiciary Committee, on State Taxation of Interstate Commerce, H. R. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965), pp. 770–777. But the volume which, under the present decision, will be placed in a favored position and exempted from bearing its fair burden of the collection of state taxes certainly will be substantial, and as state sales taxes increase, this haven of immunity may well increase in size and importance.

In *Scripto, supra,* this Court applied a sensible, practical conception of the Commerce Clause. The interstate seller who, in that case, claimed constitutional immunity from the collection of the Florida use tax had, like appellant here, no office or place of business in the State, and had no property or employees there. It solicited orders in Florida through local "independent contractors" or

[4] U. S. Bureau of the Census, 1963, Census of Business, Retail Trade Area Statistics, pt. 1, table 2, p. 1–8 (1966).

[5] See *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359 (1941); *Nelson* v. *Montgomery Ward,* 312 U. S. 373 (1941).

brokers paid on a commission basis. These brokers were furnished catalogues and samples, and forwarded orders to Scripto, out of state. The Court noted that the seller was "charged with no tax—save when . . . he fails or refuses to collect it" (362 U. S., at 211)[6] and that the State "reimburs[ed the seller] . . . for its services" as tax collector (362 U. S., at 212). The same is true in the present case.[7] I do not see how *Scripto* is meaningfully distinguishable from this case. In fact, *Scripto* involved the sale of a single article of commerce. The "exploitation" of the State's market was by no means as pervasive or comprehensive as is here involved, nor was there any reference to the company's use of the State's credit institutions.

The present case is, of course, not at all controlled by *Miller Bros.* v. *Maryland*, 347 U. S. 340 (1954). In that case, as this Court said, the company sold its merchandise at its store in Delaware; there was "no solicitation other than the incidental effects of general advertising . . . no invasion or exploitation of the consumer market. . . ." 347 U. S., at 347. As the Court noted in *Scripto*, *supra*,

---

[6] Our observation in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 365–366 (1941), is an apt response to appellant's claim that it will not be able to collect all of the tax from its purchasers: "[S]o far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid." Actually, it appears that appellant's method of doing business is such as to minimise the noncollection of the tax.

[7] The Illinois statute provides for a "discount of 2% or $5 per calendar year, whichever is greater . . . to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data . . . ." Ill Rev. Stat. (1963), c. 120, § 439.9. Appellant does not claim that this amount is inadequate to reimburse it for its expenses in collecting the tax for the State.

Miller Bros. was a case in which there was "no regular, systematic displaying of its products by catalogs, samples or the like." 362 U. S., at 212. On the contrary, in the present case, appellant regularly sends not only its catalogue, but even bulk mailings soliciting business addressed to "occupant," and it offers and extends credit to residents of Illinois based on their local financial references.

As the Court says, the test whether an out-of-state business must comply with a state levy is variously formulated: "whether the state has given anything for which it can ask return";[8] whether the out-of-state business enjoys the protection or benefits of the State;[9] whether there is a sufficient nexus: "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax."[10] However this is formulated, it seems to me entirely clear that a mail order house engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State in competition with local retailers, and soliciting deferred payment-credit accounts from the State's residents, is not excused from compliance with the State's use tax obligations by the Commerce Clause or the Due Process Clause of the Constitution.

It is hardly worth remarking that appellant's expressions of consternation and alarm at the burden which the mechanics of compliance with use tax obligations would place upon it and others similarly situated should not give us pause. The burden is no greater than that placed upon local retailers by comparable sales tax obligations; and the Court's response that these administrative and record keeping requirements could "entangle" appellant's interstate business in a welter of compli-

---

[8] *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).
[9] *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 364 (1941).
[10] *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954).

cated obligations vastly underestimates the skill of contemporary man and his machines. There is no doubt that the collection of taxes from consumers is a burden; but it is no more of a burden on a mail order house such as appellant located in another State than on an enterprise in the same State which accepts orders by mail; and it is, indeed, hardly more of a burden than it is on any ordinary retail store in the taxing State.

I would affirm.